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THE  
LIVES  
OF  
THE CHIEF JUSTICES  
OF  
ENGLAND.

FROM THE NORMAN CONQUEST TILL THE DEATH  
OF LORD MANSFIELD.

BY  
JOHN LORD CAMPBELL, LL.D., F.R.S.E.,

AUTHOR OF  
"THE LIVES OF THE LORD CHANCELLORS OF ENGLAND."

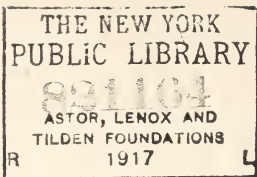
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# CONTENTS

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### CHAPTER XIX.

CHIEF JUSTICES FROM THE RESIGNATION OF SIR MATTHEW HALE TILL THE  
APPOINTMENT OF JEFFREYS.

State of the Times, Page 17. SIR RICHARD RAYNSFORD, 17. His early Career, 17. He is made a Baron of the Exchequer, 18. A Puisne Judge of the King's Bench, 18. Chief Justice, 18. He decides the great Case of Privilege on the Commitment of Lord Shaftesbury, 18. He is removed from his Office, 19. His Death, 19. His Epitaph, 19. Contrast between Raynsford and his Successor, SCROGGS, 19. Story that Scroggs was the Son of a Butcher, 20. His true Parentage, 20. He carries Arms as a Cavalier, 21. He studies Law, 21. He becomes a Serjeant, 21. He is arrested for Debt, 21. He is introduced to Charles II., 22. He is made a Puisne Judge of the Common Pleas, 22. He undermines Lord Chief Justice Raynsford, 22. He is made Chief Justice of the King's Bench, 23. The part taken by him respecting the Popish Plot, 23. Murder of Stayly, the Roman Catholic Banker, 23. Other Murders committed by Scroggs, 24. Trial of a Popish Priest, 24. Scroggs changes Sides, 25. He procures the Acquittal of Sir George Wakeman, 26. Attacks on Chief Justice Scroggs, 26. Eloquent Speech by him in his own Vindication, 26. Acquittal of the Earl of Castlemaine; and of Mrs. Cellier, 27. Dialogue with Dangerfield, 28. Ingenious Scheme to extinguish the Liberty of the Press, 28. Scroggs frustrates the Attempt to indict the Duke of York as a Popish Recusant by discharging the Grand Jury, 29. Charges against Scroggs before the King in Council, 29. He is acquitted, 30. Proceedings against him in the House of Commons, 30. Articles of Impeachment carried up to the Lords, 31. He is saved by the sudden Dissolution of Parliament, 31. Reasons for cashiering him, 31. He is cashiered, 31. He retires into the Country, 32. His Death, 32. His Character, 32.

### CHAPTER XX.

LIFE OF LORD CHIEF JUSTICE PEMBERTON.

Glance at the Career and Character of SIR FRANCIS PEMBERTON, 33. His Origin and Education, 33. At Cambridge, 34. He is entered at the Temple, 35.

His profligate Mode of Life, 35. He wastes his Patrimony, 35. He is confined for Debt in the Fleet, 35. His Reformation, 35. He makes an Arrangement with his Creditors and is discharged out of Prison, 37. He is called to the Bar, 37. His Success, 37. He is appointed "Devil" to the Attorney General, 37. He is made a Serjeant, 38. Contest about him between the two Houses of Parliament, 38. He is placed on the Bench as a Puisne Judge, 39. He is displaced, and returns to the Bar, 40. He is offered the Office of Chief Justice of the King's Bench, 40. After much hesitation he accepts it, 40. He tries Fitzharris for High Treason, 41. He tries the Roman Catholic Primate of Ireland, 42. He strives to induce the Grand Jury to find an Indictment against Lord Shaftesbury, 44. Trial of Lord Grey de Werke for the seduction of Lady Harriet Berkeley, 45. Cause of Pemberton's Removal from the office of Chief Justice of the King's Bench, 46. The London QUO WARRANTO, 47. He is made Chief Justice of the Common Pleas, 47. Office of Chief Justice of the King's Bench again Vacant, 47. Rye-house Plot, 47. Trial of Walcot, 47. Lord Russell's Case, 48. Courteous Demeanor of Pemberton to Lord Russell, 48. Determination to dismiss Pemberton from being a Judge, 49. His Decisions in Civil Cases, 49. He a third time commences Practice at the Bar, 50. He is Counsel for the Seven Bishops, 50. Question as to whether the Bishops were legally imprisoned, 51. Pemberton's Cross-examination of the Clerk of the Council, 52. Difficulty in proving a Publication in Middlesex, 51. Pemberton's Speech to show that the Petition of the Bishops was not a Libel, 53. Weight of Pemberton with the Jury as an ex-Chief Justice, 54. Treatment of Pemberton after the Revolution, 54. He is examined before the House of Commons, 55. Complaint against him of a Breach of Privilege when he was Chief Justice of the King's Bench, 56. He is committed to Newgate, 56. He again practises at the Bar, 57. His Death, 57. His Epitaph, 57.

## CHAPTER XXI.

### LIFE OF LORD CHIEF JUSTICE SAUNDERS.

Kind feeling among Lawyers for SIR EDMUND SAUNDERS in spite of his Profligacy, 58. Qu. whether he was a Foundling? 58. His first appearance in London, 59. How he learned to write, 59. His Legal Education, 59. He is called to the Bar, 59. His rapid Progress, 60. The Excellence of his Reports, 60. His Character as a Practitioner, 60. He is employed by the Government against the Whigs, 61. He pleases the King and is knighted, 62. His Argument against Fitzharris, 62. His Quarrel with Chief Justice Pemberton, 62. History of the great London QUO WARRANTO, 62. Saunders is made Chief Justice of the King's Bench, 63. His installation, 63. Hearing of the Quo Warranto, 64. Saunders's last Illness, 65. Judgment in the Quo Warranto, 65. Saunders's Conduct at the Trial of *Rex v. Pilkington*, 65. His Death, 67. His Appearance, Manners, and Habits, 67. How he has contributed to the "Grandeur of the Law," 68. His Will, 68. His Armorial Bearings, 69.

## CHAPTER XXII.

### CHIEF JUSTICES FROM THE DEATH OF SIR EDMUND SAUNDERS TILL THE REVOLUTION.

JEFFREYS Chief Justice of the King's Bench, 69. Reference to the Lives of the Chancellors, 70. Additions to the "Life of Jeffreys," 70. Supposed Reluctance of Jeffreys to support James against the Protestant Religion, 71. Vacancy in the Office of Chief Justice of the King's Bench on the Promotion of Jeffreys to be Lord Chancellor, 72. Perplexity about his Successor, 72. SIR EDWARD



HERBERT selected on account of his Opinion on the "Dispensing Power," 72. His Origin, 73. Formation of his Political Creed, 73. He is sent as Attorney General to Ireland, 73. His Position on his Return, 74. He is made Chief Justice of the King's Bench, 75. Favorable Inclination towards him notwithstanding his Unfitness, 75. Opinion delivered by him on the Trial of Lord Delamere, 75. Sir Edward Hales's Case to establish the Dispensing Power, 76. Opposition of some of the Judges, 77. Dissentient Judges are dismissed, 77. Judgment of Chief Justice Herbert, 78. Sham Dissent of Judge Street, 78. Herbert in high Favor and likely to be Chancellor, 79. Herbert on the Western Circuit, 80. Herbert offends the King by denying his Power to enforce Martial Law in time of Peace, 80. Herbert refuses to sanction the execution of a Deserter unlawfully convicted, 81. Herbert is dismissed from the office of Chief Justice of the King's Bench and made Chief Justice of the Common Pleas, 81. At the Revolution, Herbert adheres to King James, 82. He is made Lord Chancellor by King James in Exile, 82. He is excepted from the Act of Indemnity, 83. Testimonies to his Private Worth, 83. His Brothers Whigs, 83. Eminence of SIR ROBERT WRIGHT among Bad Judges, 83. His Origin, 84. His Idleness and Depravity, 84. He fails in the Profession of the Law, 84. Fraud and Perjury of which he was guilty, 84. He is patronised by Jeffreys, 85. How he was made a Judge, 85. Scene in Westminster Hall between the Lord Chief Justice of the King's Bench and the Lord Chancellor, 86. Wright promoted from being a Baron of the Exchequer to be a Justice of the King's Bench, 87. He is made Chief Justice of the King's Bench, 87. He orders a Deserter to be hanged, contrary to Law, 87. He acts as one of the Visitors to introduce Popery into Magdalene College, Oxford, 87. He sits as a Member of the High Commission Court, 89. His Activity in forcing the Clergy to read the Declaration of Indulgence, 89. Prosecution of the Seven Bishops, 89. Arraignment, 90. Trial, 91. Acquittal for Want of Evidence prevented by the Indiscretion of one of the Counsel, 91. Contest between Chief Justice Wright and Justice Powell, 91. Wright's Contest with Pemberton, 92. Doctrines of a renegade Whig, 92. The Chief Justice sums up to the Jury, 93. Opinions of the Puisnies, 93. Holloway, 93. Powell, 94. Allybone, 94. Deliberation of the Jury, 95. The Verdict, 95. Wright in danger of being dismissed, 95. Reasons, why he was not dismissed, 96. Fate of Wright at the Revolution, 96. He dies in Newgate, 96. He is buried with Felons, 96. Proceedings against him in Parliament after his Death, 97. Utility of exhibiting the Abuses of Government which led to the Revolution, 98.

## CHAPTER XXIII.

### LIFE OF LORD CHIEF JUSTICE HOLT, FROM HIS BIRTH TILL THE COMMENCEMENT OF HIS CONTESTS WITH THE TWO HOUSES OF PARLIAMENT.

Services and Character of SIR JOHN HOLT, 99. His Father, 100. His Birth, 100. At School, 100. His Early Excesses, 101. He acts the part of a Wizard, 101. He studies Law at Gray's Inn, 102. He is called to the Bar, 103. His professional Progress, 103. He is a Whig, 103. He is Counsel for the Earl of Danby and the Catholic Peers charged with being concerned in the Popish Plot, 103. He acts as Junior to Jeffreys in a Prosecution for Libel, 104. He is Counsel for Lord Russell, 105. As Counsel at the Bar he "*goes the whole Hog*," 105. His Argument in Earl of Macclesfield *v.* Starkey, 106. Attempt to seduce him by James II., 106. He is appointed Recorder of London, made King's Serjeant, and knighted, 106. He refuses to abet the arbitrary Measures of the King, and is dismissed from the office of Recorder, 107. He is continued in his office of King's Serjeant, 107. Landing of the Prince of Orange, 108. He acts as Assessor to the Peers, 108. He is elected a Member of the Convention

Parliament, 108. Conference between the two Houses on "Abdication" and "Desertion," 108. Holt's Speech as a Manager for the Commons, 109. He takes the Oaths to William and Mary, 110. He is appointed Chief Justice of the King's Bench, 110. His Merits as a Judge, 111. He is praised by the Tatler, 112. His Reporters, 112. His celebrated Judgment in *Coggs v. Bernard*, 113. He lays down the Doctrine that a Slave becomes free by breathing the Air of England, 114. His Construction of the Statute requiring Persons to attend their Parish Churches, 115. He puts an end to the Practice of giving Evidence against a Prisoner of prior Misconduct, and of trying Prisoners in Fetters, 115. Holt's Influence with his Brother Judges, 116. Weight of his Opinion with the Public, 116. His Conduct in presiding at the Trial of State Prosecutions, 117. Trial of Lord Preston for High Treason, 117. *Rex v. Charnock*, 118. *Rex v. Rookwood*, 118. Vindication of Holt for the Law laid down by him in *Sir John Freind's Case*, 119. Liberty of the Press in the Reign of Queen Anne, 120.

## CHAPTER XXIV.

### CONTINUATION OF THE LIFE OF LORD CHIEF JUSTICE HOLT TILL THE TERMINATION OF HIS CONTESTS WITH THE TWO HOUSES OF PARLIAMENT.

Holt's Contest with the House of Lords in *Rex v. Knowllys*, 121. He is summoned before a Committee of Privileges, 121. His Popularity from his Triumph over the House of Lords, 124. The Banker's Case, 125. On the Removal of Lord Somers, Holt refuses to be Lord Cancellor, 125. He is a Lord Commissioner of the Great Seal, 126. Accession of Queen Anne: Holt reappointed Chief Justice, 126. A Majority of Whigs in the House of Lords, and of Tories in the House of Commons, 127. Corrupt Decisions of the House of Commons in Election Cases, 127. The Aylesbury Case, 127. Qu. whether an Action could be maintained by an Elector against a Returning Officer for refusing his Vote? 127. The three Puisne Judges in the Negative, 127. Holt contra, 128. Judgment of the King's Bench reversed in the House of Lords, 130. Absurd Resolutions of the House of Commons, 130. Counter-Resolutions of the House of Lords, 130. Writs of Habeas Corpus by the Aylesbury Men, 131. Holt's Opinion for discharging them, 131. He is over-ruled by all the other Judges, 132. Qu. whether Writ of Error lies on a Judgment on a Return to a Writ of Habeas Corpus? 133. Commitments of Counsel by the Commons, 133. Fabulous Story of Chief Justice Holt threatening to commit the Speaker of the House of Commons, 133. The Abuse of Privilege by the House of Commons remedied by Public Opinion on a General Election, 134. Holt again refuses the Great Seal, 134.

## CHAPTER XXV.

### CONCLUSION OF THE LIFE OF LORD CHIEF JUSTICE HOLT.

Remainder of Holt's Judicial Career, 135. His Death, 135. His Funeral, 135. His Monument, 136. Holt's Want of Literature and Science, 137. He put an End to Trials for Witchcraft, 137. He exposes hypocritical Pretenders to extraordinary Virtue, 139. His Detection of a False Prophet, 139. His Practice of interrogating Prisoners on Trial, 140. His supposed Opinion as to the Illegality of employing the Military to put down Civil Disturbances, 140. His Trial at Bar with the Crown, Trin., 141. Holt as an Author, 142. He was married to a Shrew, 142. Conclusion, 142.

## CHAPTER XXVI.

## CHIEF JUSTICES FROM LORD HOLT TILL THE APPOINTMENT OF SIR DUDLEY RYDER.

SIR THOMAS PARKER, afterwards Earl of Macclesfield, Chief Justice, 143. His Life already written, 143. Vacancy in the Office of Chief Justice of the King's Bench on his Promotion to be Chancellor, 144. SIR JOHN PRATT Chief Justice, 144. His Origin and Progress at the Bar, 144. He is made a Puisne Judge, 145. Chief Justice of the King's Bench, 145. His most celebrated Judgment, 145. His Doctrine of Suspension overturned, 145. Chief Justice Pratt's Conduct in Dr. Bentley's Case, 146. He tries Laver for High Treason, 148. His Opinion respecting the Power of the King in the Marriage and Education of the Royal Family, 149. His Death, 150. LORD RAYMOND, 150. Son of Sir Thomas Raymond, 151. He is called to the Bar, 151. His Eminence as a Reporter, 151. Witchcraft put an end to by the Prosecution of an Impostor, 151. Prosecution of Beau Fielding for Bigamy, 152. Raymond is Counsel for Lindsay the Jacobite, 152. Raymond made Solicitor General by the Tories, 153. Raymond in Opposition, 153. His Speech against the Septennial Bill, 153. He joins the Whigs and is made Attorney General, 154. His Speech for the Crown in prosecuting Laver, 155. He sinks into a Puisne Judge, 155. He is made Chief Justice of the King's Bench, 156. He is raised to the Peerage, 156. His Doctrine that the Publisher of an obscene Libel may be prosecuted for a Misdemeanor, 157. He settles the Law respecting Murder and Manslaughter, 158. Major Oneby's Case, 158. Liability of a Gaoler for Murder by Neglect, 161. Lord Raymond on the Law of Libel, 164. Lord Raymond's *Nisi Prius* Decisions, 165. Lord Raymond's Abstinence from Politics, 166. His Opposition to the Bill for conducting Law Proceedings in English, 166. His Death, 166. His Monument, 167. His Epitaph, 167. Panegyric upon him, 168. LORD HARDWICKE Chief Justice of the King's Bench, 168. Difficulty in filling up the Office on his Promotion to be Chancellor, 168. SIR WILLIAM LEE Chief Justice of the King's Bench, 169. His Birth, 169. Prophecy as to the Effect of Plodding and Perseverance, 170. His Passion for Special Pleading, 170. His Victory in a great Settlement Case, 171. He is Counsel in an Appeal of Murder, 171. His Dislike of the House of Commons, 171. He is made a Puisne Judge, 171. His intimacy with Lord Hardwicke, 172. He is made Chief Justice of England, 172. His increasing Popularity, 173. His judgment in favor of the "Rights of Women," 173. Other important Points decided by him, 174. Trial of the Rebels at St. Margaret's Hill, 174. Colonel Townley's Case, 175. An Execution for High Treason, 175. M'Growther's Case, 176. The Kinlochs' Case, 176. Sir John Wedderburn's Case, 178. Signal Defeat of Chief Justice Lee in a Trial for Libel, 179. Chief Justice Lee Chancellor of the Exchequer, 180. Death of Chief Justice Lee, 180. His Diary and Almanacs, 181. Chief Justice Lee's Greatness in his own Time, 181. His *Eloge* by Sir James Burrow, 182. Chief Justice Lee's MSS., 182.

## CHAPTER XXVII.

## LIFE OF CHIEF JUSTICE RYDER.

SIR DUDLEY RYDER, 183. His Origin, 183. His Education, 184. He is called to the Bar, 184. He is made Solicitor General, 185. Description of Dublin and the Irish Bar in the beginning of the 18th Century, 185. Irish Judges and Juries, 187. Sir Dudley Ryder is made Attorney General, 187. His Speech

for the Bill to disfranchise the City of Edinburgh, 188. His Speech in support of a Motion in the House of Commons for the summary Punishment of a Libeller, 189. His Speech in Favor of Impressment, 190. His Speech for attainting the Sons of the Pretender, 191. His Speech to prove the Expediency of allowing the Insurance of Enemies' Ships, 193. His Speech on the Regency Bill, 194. His Speech in Support of Lord Hardwicke's Marriage Bill, 195. His Prosecution of Colonel Townley for High Treason, 195. His Speech on the Impeachment of Lord Lovat, 196. Signal Defeat of Mr. Attorney General and of the House of Commons, 198. Irish Porter's Song on "Sir Doodley," 199. Ryder, Lord Chief Justice, 200. He is about to be raised to the Peerage, 201. His Sudden Death, 201. Letters of Archbishop Ryder, 201. Expectation that Sir Dudley Ryder's Peerage would be conferred on his Son, 202. Letter on this subject from the Honorable Charles Yorke, 202. Sir Dudley Ryder's amiable Character in Domestic Life, 203. Letters from him to Lady Ryder, 203. View of Westminster Hall, 203. The Chancellor at Drury Lane, 204. Anniversary of Sir Dudley Ryder's Wedding-Day, 204. Fashionable Gossip, 205. Perils of a married Lawyer when living en garçon, 205. How a Lawyer may account for a Headache got by taking too much Wine, 206. Departure of the Family Coach for Bath to bring back Lady Ryder, 206. Sir Dudley's Joy at her Approach, 207. His Descendants, 207.

## CHAPTER XXVIII.

### LIFE OF CHIEF JUSTICE WILLES.

Two Chief Justices of the Common Pleas, 207. Origin of the WILLES, 208. Sir John's early Career, 208. He enters Parliament, and is made a Welsh Judge, 208. Subsequent Disappointments, 209. He becomes Attorney General, 209. His Speech against the Repeal of the Septennial Act, 210. He is made Chief Justice of the Common Pleas, 211. His Disappointment on the Death of Lord Chancellor Talbot, 211. His Intrigues with Lord Carteret, 211. He is made First Lord Commissioner of the Great Seal, 212. He loses the Chancellorship by his own Mismanagement, 213. Scene between Sir John Willes and Sir Robert Henley, 214. Sir John Willes broken-hearted, 214. Death of Sir John Willes, 214. His Judicial Decisions, 215. His Conduct on the Trial of Elizabeth Canning, 216. His Private Life, 216. His Descendants, 217.

## CHAPTER XXIX.

### LIFE OF CHIEF JUSTICE WILMOT.

Singular Characteristic of Lord Chief Justice WILMOT, 217. His Birth and Education, 217. Johnson and Garrick his Schoolfellows, 218. He is called to the Bar, 218. His Dread of being known or employed, 219. He becomes "Devil" to the Attorney General, 219. He refuses a Silk Gown, the Appointment of King's Serjeant, and a Seat in Parliament, 219. He is Counsel for the Defendant in a *Crim. Con.* Cause, 220. He retires into the Country as a provincial Counsel, 220. He is appointed a Puisne Judge of the King's Bench, 221. He is a Commissioner of the Great Seal, 222. His first refusal to be Chancellor, 223. His Escape at the Worcester Assizes, 223. Offer made to him to become Chief Justice of the Common Pleas, 224. Letter from his Brother to persuade him to accept, 224. How he became a Chief Justice by Duress, 224. Letter of Congratulation from Mr. Justice Yates, 225. From Judge Blackstone, 225. He again refuses the Great Seal, 226. He resigns



Justiceship, 226. Wilmot in Retirement, 226. His Death, 227. His Judicial Character, 227. Actionable to state in Writing that a Person has the Itch, 228. Meaning, in a Policy of "usurped Power," 228. Qu. whether an Action lies by a Lady against a Gentleman on a Covenant to marry no one but her, 229. Power of the Solicitor General when the Office of Attorney General is vacant, 230. Power of the Superior Courts to punish Contempts, 231. Satire on Chief Justice Wilmot by Horace Walpole, 232. Character of Chief Justice Wilmot by his Son, 232. Censure on his Want of Ambition, 253.

## CHAPTER XXX.

LIFE OF LORD MANSFIELD FROM HIS BIRTH TILL HE WAS CALLED TO THE BAR.

Qu. how far LORD MANSFIELD'S Career a fit Subject for Biography? 234. Sources of Interest to the Author of this Memoir in composing it, 234. Lord Mansfield's illustrious Descent, 235. Founder of the Stormont-Murrays, 236. David, 1st Viscount Stormont, 237. 5th Viscount Stormont, 237. Birth of William Murray, afterwards Earl of Mansfield, 237. Refutation of the oft-told Tale that he was removed to England in his Infancy, 238. Words which he could never learn to pronounce like an Englishman, 238. Fable of his having been educated at Lichfield, 238. Willie Murray at Perth School, 239. Items in Family Accounts for Books, &c., for him while he was a Schoolboy, 240. Deliberations respecting his further Education and his Profession, 241. His Brother James created by the Pretender Earl of Dunbar, 241. He advises that Willie should be sent to Westminster, 241. Willie to ride thither on a Pony, 242. He bids Adieu to his Native Country, 242. His Journey, 243. His Arrival in London, 243. Received and taken care of by a Scotch Apothecary, 243. Items of Disbursements for him, 244. William Murray at Westminster, 244. Letter from the kind Apothecary to his Mother respecting him, 244. Anecdote of him while at Westminster, 245. He is elected a Scholar of Christ Church, and goes to Oxford, 246. His Destination changed from the Church to the Bar, 247. Assistance afforded him by the first Lord Foley, 247. While at Oxford he is entered of Lincoln's Inn, 247. His Studies at Oxford, 248. He devotes himself to the Arts of Oratory, 249. His Latin Essay criticising Demosthenes, 249. He gains the Latin Prize Poem on the Death of George I., 251. Origin of the Rivalry between him and the elder Pitt, 252. Murray at Lincoln's Inn, 253. He attends a Debating Society, 254. He "drinks Champagne with the Wits," 255. His Intimacy with Pope, 255. His Excursion to France and Italy, 256. He is called to the Bar, 256. His Accomplishments as an Advocate, 257.

## CHAPTER XXXI.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE WAS MADE SOLICITOR GENERAL AND ENTERED THE HOUSE OF COMMONS.

At first without Business, 257. His Attachment to his Profession, 257. He takes Chambers in King's Bench Walk, where he is visited by Pope, 258. His letters "on the Study of Ancient and Modern History," 258. He prospers at the Bar of the House of Lords, 259. He is Counsel against the Bill for Disfranchising the City of Edinburgh for the Murder of Captain Porteus, 261. He is crossed in Love, 262. Comforted by Pope, 263. Cured by Business, 264. He is placed at the Head of the Bar by his Speech in a Crim. Con. Cause, 264. No Truth in the vulgar Story of his being suddenly required to speak on his Leader being taken ill, 264. Sarah, Duchess of Marlborough, his Client, 265.

He appears at the Bar of the House of Commons on the Petition for a War with Spain, 265. His Marriage, 266. After the Fall of Sir Robert Walpole he attaches himself to the Pelhams, 267. He is made Solicitor-General, 267. His Private Life, 268. His friendly Letter to Booth the Conveyancer, 269. Letters from him to Lord Milton, the Scotch Judge, 269. Regret of Pope that Murray had abandoned the Muses for Law and Politics, 271. Verses written by Pope in Murray's Chambers, 271. Their last Meeting, 272.

## CHAPTER XXXII.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE WAS MADE ATTORNEY GENERAL.

Murray's brilliant Success in the House of Commons, 272. Pitt his Rival, 273. Murray's Speech on the Employment of Hanoverian Troops, 273. Murray the Prop of the Administration in the House of Commons, 275. Rebellion of 1745, 276. Suspension of the Habeas Corpus Act, 277. Murray prosecutes the rebel Lords, 277. Trial of Lord Balmerino, 277. Trial of Lord Lovat, 278. Lord Lovat's Compliment to Mr. Murray, 279. Libels upon him indiscreetly answered, 281. Murray an ultra Free Trader, 281. His Speech in Defence of the Treaty of Aix-la-Chapelle, 282. Interval of Quiet to Murray in the House of Commons while Pitt was in Office, 283. Death of Frederick, Prince of Wales, 283. The Regency Bill, 284. Charge against Murray that he drank the Health of the Pretender, 285. Hearing of the Charge before the Privy Council, 286. Murray's Speech in his own Defence, 286. He is acquitted, but suspected, 288. Pitt's Attack upon him as a Jacobite, 289. Murray's celebrated Vindication of our Naval Rights, 290. His Private Life, 290. His Enjoyment of Lassitude, 291. His Patronage of Blackstone, 291. Death of Mr. Pelham, 292. Murray declines the situation of Prime Minister, 292. Duke of Newcastle Prime Minister, 292. Murray, Attorney General, 293.

## CHAPTER XXXIII.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE WAS MADE LORD CHIEF JUSTICE OF THE KING'S BENCH.

Murray refuses the Rolls, 293. Passages of Arms between Murray and Pitt, 295. Letter to Lord Milton announcing his Appointment as Lord Justice Clerk, 295. Disagreeable and apparently desperate Position in which Murray found himself, 296. Sudden Death of Sir Dudley Ryder, 296. Murray claims the Office of Chief Justice of the King's Bench, 297. Vain Efforts of the Duke of Newcastle to induce him to remain in the House of Commons, 297. Murray Chief Justice of the King's Bench, 298. The Appointment generally approved of, 299. His Farewell address on taking leave of Lincoln's Inn, 300.

## CHAPTER XXXIV.

### VIEW OF LORD MANSFIELD'S JUDICIAL CHARACTER AND OF HIS DECISIONS.

He takes his Seat in the Court of King's Bench, 301. Necessity for a Review of Lord Mansfield's Judgments, 302. Was he a great Judge? 302. His unparalleled Ascendency in Westminster Hall, 303. His passionate Love of the Duties of a Judge, 305. Reforms of Procedure introduced by him, 305. Improvements, founded on Principle, which he contemplated, 308. Panegyric

upon Lord Mansfield by Buller, 309. His Treatment of the Law of Insurance, 310. Bills of Exchange, 312. Right to Freight, 313. Employment of "Puffers" at an Auction, 313. His Colonial Law, 314. *Campbell v. Hall*, 314. Legality of Ransom Bills, 316. Remedy against the Governor of a Foreign Possession, 317. *Fabrigas v. Mostyn*, 317. Lord Mansfield's Respect for the Jurisdiction of other Courts, 318. Right to Wreck, 319. *Somerset's Case*: a Slave becomes free in England, 320. Legality of Pressing Seamen, 321. Wagers, 321. On the Result of an Appeal to the House of Lords, 321. Two Heirs "running their Fathers," 322. On the Sex of the Chevalier D'Eon, 323. Conspiracy to corrupt a young Female indictable, 325. Lord Grosvenor *v.* Duke of Cumberland, 325. Literary Property, 326. Lord Mansfield's Decisions on the Law of Evidence, 329. Famous Case of *Perrin v. Blake*, 329. Controversy respecting the contradictory Opinions given by Lord Mansfield, 332. Charge of Junius against Lord Mansfield for trying to subvert the Common Law, 334. Censure of him by Lord Redesdale, 335. Vindication of Lord Mansfield, 335. His supposed Preference for the Civil Law, 336. His supposed Neglect of established Forms and former Decisions, 336. His supposed Confounding of Legal and Equitable Jurisdiction, 336. His real Love for Common-Law Modes of Proceeding, 338. Lord Mansfield as a Criminal Judge, 339. Lord Mansfield's Merits in deciding Scotch Appeals in the House of Lords, 339. The Douglas Cause: Explanation of Lord Mansfield's bad Speech upon it, 340.

## CHAPTER XXXV.

CONTINUATION OF THE LIFE OF LORD MANSFIELD FROM HIS BEING MADE CHIEF JUSTICE TILL THE ACCESSION OF GEORGE III.

Offer to Lord Mansfield of the Great Seal, 340. He takes his seat in the House of Peers, 341. His Maiden Speech there, 342. Lord Mansfield Chancellor of the Exchequer, 342. Intrigues for the Formation of a new Ministry, 343. Lord Chatham's first Government, 344. Lord Mansfield again refuses the Great Seal, 344. He is a Member of the Cabinet, 344. He throws out the Habeas Corpus Amendment Bill, 346. Trial of De Hensey for High Treason, 347. End of the reign of George II., 347.

## CHAPTER XXXVI.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL THE DISAPPEARANCE OF JUNIUS.

Accession of George III., 348. Lord Mansfield reappointed Chief Justice, 348. Liaison between Lord Mansfield and Lord Bute, 348. Resignation of Lord Chatham, 349. Prudent Advice given by Lord Mansfield to Lord Bute, 349. Rumor that Lord Mansfield wished to be Chancellor, 349. Lord Bute's Differences with Lord Mansfield, and subsequent Imprudence, 350. Lord Bute resigns, 351. Lord Mansfield continues a member of the Cabinet, 351. General Warrants, 351. Wilkes' Outlawry, 353. Lord Mansfield's Judgment reversing the Outlawry, 353. Lord Mansfield retires from the Cabinet, 356. Disputes with America, 356. Lord Mansfield again refuses the Great Seal, 358. Question respecting the Middlesex Election, 358. Lord Chatham's Attack on Lord Mansfield, 359. Lord Mansfield quails under the Infliction, 360. Lord Chatham's Blunder about "an Action for Damages against the House of Commons," 361. Lord Mansfield's Speech against Lord Chatham's Bill to reverse the Decision of the House of Commons in the Middlesex Elec-

tion Case, 362. Junius' Letter to the King, 363. *Rex v. Almon*, 363. *Rex v. Woodfall*, 364. *Rex v. Miller*, 365. Junius' first Letter to Lord Mansfield 367. Attacks upon Lord Mansfield in Parliament, 369. His successful Defence of himself, 370. Lord Mansfield's subsequent Indiscretion and Cowardice in his Contest with Lord Camden, 371. Lord Mansfield gives the Great Seal to Lord Bathurst, 373. New Attacks on Lord Mansfield by Junius, 374. Junius at last silenced, 375.

## CHAPTER XXXVII.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL THE DEATH OF LORD CHATHAM.

Lord Mansfield visits Paris, 376. Progress of the Disputes with America, 376. Lord Mansfield's Speech for a vigorous Prosecution of the War, 377. Specimen of the Manners of the House of Lords in the reign of George III., 378. Supposed Consequences of the Independence of America, 380. Trial of the Duchess of Kingston for Bigamy, 381. Lord Mansfield created an Earl, 381. Trial of John Horne Tooke for a Libel, 382. Disasters in America, 383. Death of Lord Chatham, 384. Lord Mansfield's Behavior on this Occasion, 385.

## CHAPTER XXXVIII.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL THE CONCLUSION OF THE TRIAL OF LORD GEORGE GORDON.

Decline of Lord Mansfield's Political Importance after the Death of Lord Chatham, 387. He recommends a Coalition of Parties, 388. Lord George Gordon's Riots, 388. Lord Mansfield's Love of religious Toleration, 388. Remedy to Dissenting Ministers, 388. Evidence of a Quaker admitted in an Action for Bribery, 389. A Dissenter not liable to a Penalty for not accepting an Office requiring Conformity to the Established Church, 390. Acquittal of a Roman Catholic Priest charged with the Crime of saying Mass, 391. Bill to mitigate the Penal Laws against Catholics, 392. Anti-Popery Riots and Petitions, 392. Violent Speech of Lord George Gordon in the House of Commons, 393. Monster Petition from the Protestant Association to the House of Commons, 393. Meeting in St. George's Fields, 393. Assault on the Peers, 394. Great Courage displayed by Lord Mansfield, 395. He is deserted by all his Brother Peers, 396. He gets home in Safety, 396. His House is burnt down by the Mob, 398. Stanzas by Cowper on the Burning of Lord Mansfield's Library, 398. The Riots are at last quelled, 400. Lord Mansfield's Speech vindicating the Employment of the Military for that purpose, 400. He presides at the Trial of Lord George Gordon, 403. Erskine's Allusion to the Burning of Lord Mansfield's House, 404. Lord Mansfield's Exposition of the Law of High Treason, 404. Lord George Gordon is acquitted, 404.

## CHAPTER XXXIX.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE RESIGNED THE OFFICE OF CHIEF JUSTICE.

Lord Mansfield takes no part in Politics during the Administrations of Lord Rockingham and Lord Shelburne, 405. He joins the Coalition, 406. Fox's India Bill in the House of Lords, 406. Mr. Pitt, Prime Minister, 408. Lord



Mansfield's last Speech in Parliament, 408. Close of Lord Mansfield's Political Career, 409. Dean of St. Asaph's Case: Rights of Juries in Cases of Libel, 410. Progress of Opinion respecting the Law of Libel, 412. Action by Mr. Pitt for a Libel accusing him of gambling in the Funds, 414. Lord Mansfield's Visit to Tunbridge Wells, 415. Interview between Lord Mansfield and Lord George Sackville, 416. Lord Mansfield, unable to sit in Court, retains his Office, 417. He resigns the office of Chief Justice, 418. Address to him by the King's Bench Bar, 418. His answer, 418.

## CHAPTER XL.

## CONCLUSION OF THE LIFE OF LORD MANSFIELD.

Lord Mansfield in Retirement, 419. His Opinion upon the Introduction of Jury Trial in Civil Cases in Scotland, 420. Recollections of Lord Mansfield by his Grand-Nephew, 421. His Amusements, 422. His care of his Fortune, 422. He abstains from giving any Opinion upon the Regency Question, 423. His Views of the French Revolution, 423. His continuing Powers of Memory, 425. His last Illness, 425. His Death, 425. His Funeral, 426. His Will, 426. His Position among the Lawyers of the Eighteenth Century, 426. Felicity of the Life of a Lawyer practising under him, 429. Solution of the Charge that he knew no Law, 429. Sermon written by him and preached by a Bishop, 430. His demeanor in Society, 430. His Facetiæ, 431. Jokes on Serjeant Hill, 433. His Advice to a General about to act as a Colonial Judge, 434. The Space occupied by him in the Public Eye, 434. His Habits of Industry and Temperance, 435. His Defects and Faults, 437. Without original Genius, 437. His Want of Moral Courage, 437. Without Warmth of Affection, 437. Defence of his Public Conduct, 438. Lampoon upon him supposed to be written by a Chief Justice, 438. His Character by Smollett, 439. By other Contemporaries, 439. By Lord Monboddo, 440. By Bishop Hurd, 440. By Bishop Newton, 440. Tribute to his memory by Professor Story, 441. Imitations of his Manner of Speaking, 442. Likeness of him, 442. Aspiration of the Author, 442.



# LIVES

OF THE

## CHIEF JUSTICES OF ENGLAND.

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### CHAPTER XIX.

CHIEF JUSTICES FROM THE RESIGNATION OF SIR MATTHEW HALE  
TILL THE APPOINTMENT OF JEFFREYS.

ON the resignation of Sir Matthew Hale the times were yet tolerably quiet, and there being no Government job to be done in the Court of King's Bench, a disposition existed to appoint [A. D. 1676.] a respectable man to succeed him; but a great penury of learning and ability was discovered in looking to those, either at the bar or on the bench, whose fitness was canvassed, and, at last, Lord Nottingham, who now held the great seal, decided that he could not do better than promote SIR RICHARD RAYNSFORD, a Puisne Judge of this court, to be Chief Justice. He was a man of good family, fair estate, decent character, and agreeable manners, with a sufficient portion of understanding and learning to keep him above contempt.

Descended from the Raynsfords of Raynsford, in the county of Lancaster, he was of a branch of the family settled at Dullington, in Northamptonshire. He began life as a younger brother, and was bred to the bar at Lincoln's Inn. His relations, were strong Cavaliers, and he himself entertained, in his heart, a thorough hatred of Roundheads; but, entering upon his professional career when the Parliament had gained a complete ascendancy over the King, he deemed it more prudent to submit to the ruling powers, and in 1653 he was chosen Deputy Recorder of Northampton; but he neither obtained nor sought any farther preferment till the Restoration. By the death of his elder brother he obtained possession of the patrimonial property, reckoned worth 600*l.* a year, and he was to have been made one of the "KNIGHTS OF THE ROYAL OAK" if that order, which was in contemplation, had been established. Although he represented the county of Northampton in the Convention Parliament, and that which followed, and he was

looked upon rather as a country squire than a lawyer, he had a liking for the profession, and he continued to attend the courts, and to go the circuit. In 1663 he was made a Baron of the Exchequer, and for six [Nov. 16, 1663.] years he sat, almost dumb, listening to profound elucidations of the law from the lips of Lord Chief Baron Hale. It was then convenient that he should be transferred to the King's Bench,<sup>1</sup> where he still maintained his reputation for good [Feb. 6, 1669.] sense and discretion. No one having dreamed of his going higher, the news of his appointment as Chief [April 12, 1676.] Justice of England caused considerable surprise; but, on account of his inoffensiveness and gentlemanlike deportment, there was a general inclination to support him and to speak well of him.

He held his office two years,—till the Popish plot broke out, and the Government deemed it necessary to substitute for him a tool better fashioned for doing the horrid work then on hand to their mind—SIR WILLIAM SCROGGS; who, next to JEFFREYS,—and at a very short distance from him,—is considered the most infamous Judge who ever sat on the English bench.

During the Lord Chief Justice Raynsford's time, one case of great public interest arose, and this he disposed of very satisfactorily. The famous Earl of Shaftesbury—having been sent to the Tower by the House of Peers, under a warrant which merely stated that it was “for high contempts committed against this House,” without specifying what the offence was—sought to be discharged by a writ of *habeas corpus*, returnable in the King's Bench,—on the ground that the warrant was illegal; and he and his counsel argued very plausibly that every freeman was entitled to know the charge on which he was deprived of his liberty, and that what the Lords construed as a high contempt might, in reality, be an act perfectly innocent, or such as it was the duty of the party imprisoned to do under the obligation of a statute or of the common law.

At this time Shaftesbury was highly obnoxious to Danby, the Prime Minister, who earnestly desired to detain his rival in custody; otherwise, no one can tell how the point of privilege would have been settled. We are bound, however, to suppose that all the Judges of the Court looked only to the just principles on which parliamentary privilege is founded, and to Chief Justice Newdigate's decision in Sir Robert Pye's case during the Commonwealth.

*Raynsford, C. J.*: “This Court has no jurisdiction of the cause, and therefore we cannot take into consideration the form of the return. We ought not to extend our jurisdiction beyond its due limits, and the practice of our ancestors will not warrant us in such an attempt. The consequence would be very mischievous if this Court should deliver a member

<sup>1</sup> 2 Keble, 469. On this occasion he took precedence of a King's Bench Puisne, who had been made a judge after him:—“Et donque sans autre ceremony, il seure le ba, supra Morton, quai, il fust Baron devenant que Morton faust fait Justice.”—1 *Sid.* 408.

of the House of Peers or Commons, committed for contempt, for thereby the public business may be retarded; for it may be the commitment was for evil behavior or indecent reflections on other members, to the disturbance of the affairs of Parliament. The commitment in this case is not for safe custody, but in execution of the judgment given by the Lords for the contempt; and, therefore, if he were bailed he would be delivered out of execution. For a contempt *in facie curiæ* there is no other judgment. This Court has no jurisdiction, and therefore the prisoner must be remanded."<sup>1</sup>

So he lay in custody till he was obliged to make an abject apology to obtain his liberation, and he seemed for ever ruined as a public man—when the Popish plot suddenly made him more popular and more powerful than ever.

The shadow of this coming event was the signal for the dismissal of Sir Richard Raynsford—the first instance of such an exercise of the prerogative during the present reign.<sup>2</sup> Although there had been before him four Chief Justices of the King's Bench appointed by Charles II. in rapid succession, the first three had died in office, and the fourth had voluntarily resigned. Raynsford was very unwilling to retire, but, being plainly told that this step was necessary for the King's service, he at last quietly submitted, and as he had no quarrel with the Government, the act of cashiering him was carried through [MAY, 1678.] with all becoming delicacy.

He retired to his country house at Dullington, and—having founded almshouses there for the good of his soul, to maintain old men and old women, with an allowance of 2s. weekly to each—he died on the 17th of December, 1679, in the 75th year of his age. A monument was erected to his memory in the parish church, with an inscription from which it might be supposed that he was a greater Chief Justice than Coke, Hale, Holt, or Mansfield. I will give a short specimen of it:—

“Richardi Raynsford Militis  
Nuper de Banco Regis Capitalis Justiciarii, &c.  
Eximii sui seculi decus,  
Quem non cœca sors, at spectata virtis,  
Ad illos quos ornavit honores exexit,  
Quem summa in Deum pietas, in patriam, charitas,  
In Regem, in ecclesiam, inconcussa fides,  
In jure dicendo erudita probitas,  
Asylum bonis, flagellum malis,” &c. &c.<sup>3</sup>

Never was there a more striking contrast than between Chief Justice Raynsford and his immediate successor. SCROGGS had excellent natural abilities, and might have made a great figure in his possession; but was profligate in his habits, brutal in his manners, with only one rule to guide

<sup>1</sup> 6 St. Tr. 1171.

<sup>2</sup> “T. T. 3 Car. II., Mundum. This term Sir Richard Raynsford was removed, and Sir William Scroggs, one of the Justices of the Common Pleas, was made Lord Chief Justice of the King's Bench.”—(1 Vent. 329.)

<sup>3</sup> Bridges' Northampton, i. 495.

him—a regard to what he considered his own interest,—without a touch of humanity,—wholly impenetrable to remorse.

It was positively asserted in his lifetime, and it has been often repeated since, that he was the son of a butcher, and that he was so cruel as a judge because he had been himself accustomed to kill calves and lambs when he was a boy.

A popular ballad, published at the time when he was pouring forth innocent blood like water, contained these stanzas :—

- “A butcher’s son’s Judge Capital,  
 Poor Protestants to enthral,  
 And England to enslave, sirs;  
 Lose both our laws and lives we must,  
 When to do justice we entrust  
 So known an arrant knave, sirs.
- “His father once exempted was  
 Out of all juries; why? because  
 He was a man of blood, sirs.  
 And why the butcherly son (forsooth!)  
 Should now be judge and jury both,  
 Cannot be understood, sirs.
- “The good old man, with knife and knocks,  
 Made harmless sheep and stubborn ox  
 Stoop to him in his fury;  
 But the bribed son, like greasy oaph,  
 Kneels down and worships golden calf,  
 And massacres the jury.”<sup>1</sup>

There are many grave prose authorities to the same effect. Roger North, who must have known him familiarly for many years, and highly approved of his principles, says, “This Sir William Scroggs was of a mean extract, having been a butcher’s son;”<sup>2</sup> and Sir William Dugdale, supposed to be the most accurate of genealogists, being not only a man of profound antiquarian learning, but at the head of heraldry as GARTER KING AT ARMS, wrote, in answer to inquiries on the subject from Wood, the author of the *ATHENÆ*, “Sir William Scroggs was the son of a one-eyed butcher near Smithfield Bars; and his mother was a big fat woman, with a red nose like an ale-wife.”<sup>3</sup>

Yet it is quite certain that the usual solution of Scroggs’s taste for blood is a pure fiction, for he was born and bred a gentleman. Some said, jocularly, that he was descended from the ancient Welsh family *Kilmaddock* of *Kilmaddocks*,<sup>4</sup> but, in truth, his father was a squire, of respectable family and good estate, in Oxfordshire. Young Scroggs was several years at a grammar-school, and he took a degree with some credit in the University of Oxford, having studied first at Oriel, and then [A. D. 1639–43.] at Pembroke College. He was intended for the Church, and, in quiet times, might have died respected

<sup>1</sup> This metrical broadside is entitled “Justice in Masquerade.”

<sup>2</sup> Life of North, i. p. 296.

<sup>3</sup> *Athenæ*, vol. iv. p. 117. Wood cautions his readers against giving implicit credit to this statement, as Dugdale had a spite against Scroggs, who had refused to pay certain fees to the College of Arms, which had been demanded of him when he was made a knight.

<sup>4</sup> Kill—mad—ox.



as a pains-taking curate, or as Archbishop of Canterbury. But, the civil war breaking out while he was still under age, he enlisted in the King's cause, and afterwards commanded a troop of horse, which did good service in several severe skirmishes. Unfortunately, his morals did not escape the taint which distinguished both men and officers on the Cavalier side.

The dissolute habits he had contracted unfitted him entirely for the ecclesiastical profession, and he was advised to try his luck in the law. He had a quick conception, a bold manner, and an enterprising mind; and prophecies were uttered of his great success if he should exchange the cuirass for the long robe. He was entered as a student at Gray's Inn, and he showed that he was capable, by short fits, of keen application; but his love of profligacy and of expense still continued, and both his health and his finances suffered accordingly.

However, he contrived to be called to the bar; and some of his pot companions being attorneys, they occasionally employed him in causes likely to be won by a loud voice and an unscrupulous appeal to the prejudices of the jury. He practised in the King's Bench, where, although he now and then made a splashy speech, his business by no means increased in the same ratio as his debts. "He was," says Roger North, "a great voluptuary, his debaucheries egregious, and his life loose; which made the Lord Chief Justice Hale detest him." Thinking that he might have a better chance in the Court of Common Pleas, where the men in business were very old and dull, he took the degree of the coif, and he was soon after made a King's Serjeant. Still, [JUNE 25, 1669.] however, he kept company with Ken, Guy, and the high-Court rakes, and his clients could not depend upon him. His visage being comely, and his speech witty and bold, he was a favorite with juries, and sometimes carried off wonderful verdicts; but, [NOV. 21.] when he ought to have been consulting his chamber in Serjeants' Inn, he was in a tavern or gaming house, or worse place, near St. James's palace. Thus his gains were unsteady, and the fees which he received were speedily spent in dissipation, so that he fell into a state of great pecuniary embarrassment. On one occasion, he was arrested by a creditor in Westminster Hall as he was about to enter his coach. The process being out of the King's [A. D. 1669-76.] Bench, he complained to that Court of a breach of his privileges as a Serjeant; but Lord Chief Justice Hale refused to discharge him. He afterwards pleaded his privilege, and brought an action for what he called the illegal arrest, contending that, as a Serjeant-at-law, he could only be regularly sued in the Court of Common Pleas. The Judges decided unanimously against him, Hale observing, "Although Serjeants have a monopoly of practice in the Common Pleas, they have a right to practise, and do often practise at this bar; and if we were to assign one of them as counsel, and he were to refuse to act, we should make bold to commit him to prison."<sup>1</sup>

<sup>1</sup> Freeman, 389.; 2 Lev. 129.; 3 Keb. 424, 439, 440.; Roger North's Lives of the Norths, i. 137.

Meanwhile, Serjeant Scroggs was in high favor with Lord Shaftesbury's enemies, who, on the commitment of that turbulent leader to the Tower for breach of privilege, had gained a temporary advantage over him. Through the agency of Chiffinch, superintendent of the secret intrigues of every description which were carried on at Whitehall, he had been introduced to Charles II., and the merry monarch took pleasure in his licentious conversation. What was of more importance to his advancement, he was recommended to the Earl of Danby, the reigning Prime Minister, as a man that might be useful to the Government if he were made a judge. In consequence, on the 23d of October, 1676, he was knighted, and sworn in a Justice of the Court of Common Pleas. Sir Allan Broderick, in a letter to "the Honorable Lawrence Hyde," written a few days after, says, "Sir William Scroggs, on Monday, being admitted Judge, made so excellent a speech that my Lord Northampton, then present, went from Westminster to Whitehall immediately, and told the King he had, since his happy restoration, caused [A. D. 1678.] many hundred sermons to be printed, and which together taught not the people half so much loyalty; therefore, as a sermon, desired his command to have it printed and published in all the market towns in England.<sup>1</sup>

Mr. Justice Scroggs gave himself little trouble with law business that came before the Court; but, in addressing grand juries on the circuit, he was loud and eloquent against the proceedings of the "country party," and he still continued to be frequently in the circle at Whitehall, where he took opportunities not only to celebrate his own zeal, but to sneer at Sir John Raynsford, the Chief Justice of the King's Bench, whose place he was desirous to fill.<sup>2</sup> Chiffinch, and his other patrons of the back-stairs, were in the habit of sounding his praise, and asserting that he was the only man who, as head of the King's Bench, could effectually cope with the manœuvres of Shaftesbury. This unconquerable intriguer, having been discharged from custody, was again plotting against the Government, was preparing to set up the legitimacy of Monmouth, and was asserting that the Duke of York should be set aside from the succession to the throne and prosecuted as a Popish recusant. There had been a reluctance to exercise the prerogative of cashiering judges, which had been dormant during the long reign of Elizabeth, and the abuse of which had caused such scandal in the reigns of James I. and Charles I. But these scruples being once overcome were wholly disregarded. From this time the system recommenced of clearing the bench for political reasons, and it was continued till, the vilest wretch the profession of the law could furnish being Chief Justice of England, his tenure of the office became in some degree independent.<sup>3</sup>

<sup>1</sup> Correspondence of the Earls of Clarendon and Rochester, vol. i. p. 2.

<sup>2</sup> In consequence of the intrigues of Puisne Judges desirous of becoming Chiefs in the reigns of Charles II. and James II., the rule was laid down at the Revolution that a Puisne Judge is only to attend one levee on his appointment, and is never again to appear at court.

<sup>3</sup> Sir Robert Wright, James II.'s last Chief Justice who presided at the trial of the Seven Bishops.

The immediate cause of Raynsford's removal was the desire of the Government to have a Chief Justice of the King's Bench on whose vigor and subserviency reliance could be placed, to counteract the apprehended machinations of Shaftesbury.

On the 31st of May, 1678, Sir William Scroggs was sworn into the office,<sup>1</sup> and he remained in it for a period of three years. How he conducted himself in civil suits is never once mentioned, for the attention of mankind was entirely absorbed by his scandalous misbehavior as a Criminal Judge. He is looked to with more loathing, if not with more indignation, than Jeffreys, for in his abominable cruelties he was the sordid tool of others, and in his subsequent career he had not the feeble excuse of gratifying his own passions or advancing his own interests.

Although quite indifferent with regard to religion, and ready to have declared himself a Papist, or a Puritan, or a Mahometan, according to the prompting of his superiors,—finding that the policy of the Government was to outbid Shaftesbury in zeal for Protestantism, he professed an implicit belief in all the wonders revealed by Titus Oates, in the murder of Sir Edmondbury Godfrey by Papists, and in the absolute necessity for cutting off without pity all those who were engaged in the nefarious design to assassinate the King, to burn London, and to extinguish the flames with the blood of Protestants. He thought himself to be in the singularly felicitous situation of pleasing the Government while he received shouts of applause from the mob. Burnet, speaking of his appointment, says, "It was a melancholy thing to see so bad, so ignorant, and so poor a man raised up to that great post. Yet he, now seeing how the stream ran, went into it with so much zeal and heartiness that he was become the favorite of the people."<sup>2</sup>

The first of the Popish Plot judicial murders—which are more disgraceful to England than the massacre of St. Bartholomew's is to France—was that of *Stayly*, the Roman Catholic banker. Being [A. D. 1679.] tried at the bar of the Court of King's Bench, Scroggs, according to the old fashion, which had gone out during the Commonwealth, repeatedly put questions to the prisoner, attempting to intimidate him, or to involve him in contradictions, or to elicit from him some indiscreet admission of facts. A witness having stated that "he had often heard the prisoner say he would lose his blood for the King, and speak as loyally as man could speak," Scroggs exclaimed, "*That is, when he spoke to a Protestant!*" In summing up, having run himself out of breath by the violence with which he declaimed against the Pope and the Jesuits, he thus apologised to the jury:—

"Excuse me, gentlemen, if I am a little warm, when perils are so many, murders so secret, that we cannot discover the murderer of that gentleman whom we all knew so well.<sup>3</sup> When things are transacted so

<sup>1</sup> 1 Vent. 329. ; Sir Thomas Raynord, 244.

<sup>2</sup> Own Times, ii. 69. He thus introduces our hero:—"The Lord Chief Justice at that time was Sir William Scroggs, a man more valued for his good readiness in speaking well than either for learning in his profession or for any moral virtue. His life had been indecently scandalous, and his fortunes were very low."

<sup>3</sup> Sir E. Godfrey.

closely, and our King is in great danger, and religion is at stake, I may be excused for being a little warm. You may think it better, gentlemen, to be warm here than in Smithfield. Discharge your consciences as you ought to do. If guilty, let the prisoner take the reward of his crime, for perchance it may be a terror to the rest. I hope I shall never go to that heaven where men are made saints for killing kings."

The verdict of *guilty* being recorded, *Scroggs, C. J.*, said, "Now, you may die a Roman Catholic; and, when you come to die, I doubt you will be found a priest too. The matter, manner, and all the circumstances of the case make it plain; you may harden your heart as much as you will, and lift up your eyes, but you seem, instead of being sorrowful, to be obstinate. Between God and your conscience be it; I have nothing to do with that; my duty is only to pronounce judgment upon you according to law—you shall be drawn to the place of execution, where you shall be hanged by the neck, cut down alive," &c. &c.

The unhappy convict's friends were allowed to give him decent burial; but, because they said a mass for his soul, his body was, by order of Lord Chief Justice Scroggs, taken out of the grave, his quarters were fixed upon the gates of the city, and his head, at the top of a pole, was set on London Bridge. So proud was Scroggs of this exploit, that he had an account of it written, for which he granted an *IMPRIMATUR*, signed with his own name.<sup>2</sup>

I must not run the risk of disgusting my readers by a detailed account of Scroggs' enormities on the trials of Coleman, Ireland, Whitebeard, Langhord, and the other victims whom he sacrificed to the popular fury under pretence that they were implicated in the Popish Plot. Whether sitting in his own court at Westminster, or at the Old Bailey in the City of London, as long as he believed that Government favored the prosecutions, by a display of all the unworthy arts of cajoling and intimidation he secured convictions. A modern historian, himself a Roman Catholic priest, says, with temper and discrimination, "The Chief Justice Scroggs, a lawyer of profligate habits and inferior acquirements, acted the part of prosecutor rather than of judge. To the informers he behaved with kindness, even with deference, suggesting to them explanations, excusing their contradictions, and repelling the imputation on their characters; but the prisoners were repeatedly interrupted and insulted; their witnesses were brow-beaten from the bench, and their condemnation was generally hailed with acclamations, which the court rather encouraged than repressed."<sup>3</sup>

Meanwhile the Chief Justice went the circuit; and although the Popish Plot did not extend into the provinces, it may be curious to see how he demeaned himself there. Andrew Bromwich, being tried before him capitally, for having administered the sacrament of the Lord's Supper according to the rites of the Church of Rome, thus the dialogue between them proceeded:—

<sup>1</sup> 6 St. Tr. 1501–1512. For this he probably received a good sum of money.

<sup>2</sup> Lingard, xii. 161. See 7 St. Tr. 1–591.



*Prisoner* : "I desire your Lordship will take notice of one thing, that I have taken the oaths of allegiance and supremacy, and have not refused anything which might testify my loyalty." *Scroggs, C. J.* : "That will not serve your turn; you priests have many tricks. What is that to giving a woman the sacrament several times?" *Prisoner* : "My Lord, it was no sacrament unless I be a priest, of which there is no proof." *Scroggs* : "What! you expect we should prove you a priest by witnesses, who saw you ordained? We know too much of your religion; no one gives the sacrament in a wafer, except he be a popish priest: you gave that woman the sacrament in a wafer: *ergo*, you are a popish priest." Thus he summed up: "Gentlemen of the Jury, I leave it upon your consciences whether you will let priests escape, who are the very pests of Church and State; you had better be rid of one priest than three felons; so, gentlemen, I leave it to you."

After a verdict of GUILTY, the Chief Justice said, "Gentlemen, you have found a good verdict, and if I had been one of you I should have found the same myself." He then pronounced sentence of death, describing what seemed to be his own notion of the Divine Being, while he imputed this blasphemy to the prisoner,—“You act as if God Almighty were some omnipotent mischief, that delighted and would be served with the sacrifice of human blood.”<sup>1</sup>

Scroggs was more and more eager, and “ranted on that side more impetuously,”<sup>2</sup> when he observed that Lord Shaftesbury, who, although himself too shrewd to believe in the Popish Plot, had been working it furiously for his own purposes, was taken into office on the formation of Sir William Temple’s new scheme of administration, and was actually made President of the Council. But he began to entertain a suspicion that the King had been acting a part against his inclination and his judgment, and, having ascertained the real truth upon this point, he showed himself equally versatile and violent by suddenly going over to the opposite faction. Roger North gives the following racy account of his conversion:—

“It fell out that when the Earl of Shaftesbury had sat some short time in the Council, and seemed to rule the roast, yet Scroggs had some qualms in his political conscience; and coming from Windsor in the Lord Chief Justice North’s coach, he took the opportunity and desired his Lordship to tell him seriously if my Lord Shaftesbury had really so great power with the King as he was thought to have. His Lordship answered quick, ‘No, my Lord, no more than your footman hath with you.’ Upon that the other hung his head, and, considering the matter, said nothing for a good while, and then passed to other discourse. After that time he turned as fierce against Oates and his plot as ever before he had ranted for it.”<sup>3</sup>

The first Popish Plot case which came on after this conversion was the [A. D. 1680.] trial of Sir George Wakeman, the Queen’s physician, against whom Oates and Bedloe swore as stoutly as ever; making out a case which implicated, to a certain degree, the Queen herself.

<sup>1</sup> 7 St. Tr. 715–730.

<sup>2</sup> Roger North.

<sup>3</sup> Life of Guilford, i. 297.

But Chief Justice Scroggs now sneered at the marvellous memory or imagination of Oates; and, taking very little notice, in his summing up, of the evidence of Bedloe, thus concluded:—

“If you are unsatisfied upon these things put together, and, well weighing, you think the witnesses have not said true, you will do well to acquit.” *Bedloe*: “My Lord, my evidence is not right summed up.” *Scroggs, C. J.*: “I know not by what authority this man speaks. Gentlemen, consider of your verdict.”

An acquittal taking place, not only were Oates and Bedloe in a furious rage, but the mob were greatly disappointed, for their belief in the plot was still unshaken, and Scroggs, who had been their idol a few hours ago,<sup>1</sup> was in danger of being torn in pieces by them. Although he contrived to escape in safety to his house, he was assailed next morning by broadsides, ballads sung in the streets, and libels in every imaginable shape.

On the first day of the following term, he bound over in open court the authors, printers, and signers of some of the worst of them, and made the following speech:—

“I would have all men know, that I am not so revengeful in my nature, nor so nettled with this aspersion, that I could not have passed by this and more; but the many scandalous libels that are abroad, and reflect on public justice as well as upon my private self, make it the duty of my place to defend one, and the duty I owe to my reputation to vindicate the other. This is the properest occasion for both. If once our courts of justice come to be awed or swayed by vulgar noise, it is falsely said that men are tried for their lives or fortunes; they live by chance, and enjoy what they have as the wind blows, and with the same certainty. Such a base fearful compliance made Felix, willing to please the people, leave Paul bound. The people ought to be pleased with public justice, and not justice seek to please the people. Justice should flow like a mighty stream; and if the rabble, like an unruly wind, blow against it, the stream they made rough will keep its course. I do not think that we yet live in so corrupt an age that a man may not with safety be just, and follow his conscience; if it be otherwise, we must hazard our safety to preserve our integrity. As to Sir George Wakeman’s trial, I am neither afraid nor ashamed to mention it. I will appeal to all sober and understanding men, and to the long robe more especially, who are the best and properest judges in such cases, for the fairness and equality of my carriage on that occasion. For those hireling scribblers who traduce me, who write to eat and lie for bread, I intend to meet with them another way, for, like vermin, they are only safe while they are secret. And let those vipers, those printers and booksellers by whom they vend their false and braided ware, look to it; they shall know that the law wants not power to punish a libellous and licentious press, nor I resolution to put the law in force. And this is all the answer fit to be

<sup>1</sup> “By his zeal in the Protestant cause he gained for awhile an universal applause throughout the whole nation.”—*Athenæ*. iv. 116.



given (besides a whip) to those hackney writers and dull observers that go as they are hired or spurred, and perform as they are fed. If there be any sober and good men that are misled by false reports, or by subtlety deceived into any misapprehensions concerning that trial or myself, I should account it the highest pride and the most scornful thing in the world if I did not endeavour to undeceive them. To such men, therefore, I do solemnly declare in the seat of justice, where I would no more lie or equivocate than I would to God at the holy altar, I followed my conscience according to the best of my understanding in all that trial, without fear, favor, or reward, *without the gift of one shilling, or the value of it directly or indirectly, and without any promise or expectation whatsoever.*<sup>1</sup> Do any think it an even wager, whether I am the greatest villain in the world or not—one that would sell the life of the King, my religion, and country, to Papists for money? He that says great places have great temptations, has a little if not a false heart himself. Let us pursue the discovery of the plot in God's name, and not baulk anything where there is suspicion on reasonable grounds; but do not pretend to find what is not, nor count him a turncoat that will not betray his conscience nor believe incredible things. Those are foolish men who think that an acquittal must be wrong, and that there can be no justice without an execution."<sup>2</sup>

Many were bound over; but I do not discover more than one prosecution brought to trial,—that against Richard Radley, who was convicted of speaking scandalous words of the Lord [MAY 29.] Chief Justice Scroggs, and fined 200*l*.

When the Earl of Castlemaine—the complaisant husband of the King's mistress—was brought to trial for being concerned in the Plot, Scroggs was eager to get him off, still despising popular clamor. Bedloe being utterly ruined in reputation, Dangerfield was now marched up, as the second witness, to support Oates. He had been sixteen times convicted of infamous offences; and, to render him competent a pardon under the great seal was produced. But the Chief Justice was very severe upon him, saying, in summing up, to the jury, "Whether this man be of a sudden become a saint because he has become a witness, I leave that to you to consider. Now I must tell you, though they have produced two witnesses, if you believe but one, this is insufficient. In treason, there being two witnesses, the one believed, the other disbelieved, may there be a conviction? I say, no. Let us deal fairly and above board, and so preserve men who are accused and not guilty." The defendant being acquitted, the Chief Justice was again condemned as a renegade.<sup>3</sup>

He further made himself obnoxious to the charge of having gone over to the Papists, by his conduct on the trial of Mrs. Elizabeth Cellier, who, if she had been prosecuted while he believed that the Government

<sup>1</sup> From this asseveration a suspicion arises of pecuniary corruption, but I believe that Scroggs was swayed in this instance by a disinterested love of rascality.

<sup>2</sup> 7 St. Tr. 687-706.

<sup>3</sup> Ibid. 1067-1112.

wished the Plot to be considered real, would unquestionably have been burnt alive for high treason, but now was the object of his especial protection and favor. The second witness against her was Dangerfield, who, when he was put into the box, before any evidence had been given to discredit him, was thus saluted by Chief Justice Scroggs:—

“We will not hoodwink ourselves against such a fellow as this, that is guilty of such notorious crimes. A man of modesty, after he hath been in the pillory, would not look a man in the face. Such fellows as you are, sirrah, shall know we are not afraid of you. It is notorious enough what a fellow this is. I will shake all such fellows before I have done with them.” *Dangerfield*: “My Lord, this is enough to discourage a man from ever entering into an honest principle.” *Scroggs, C. J.*: “What? Do you, with all the mischief that hell hath in you, think to have it in a court of justice? I wonder at your impudence, that you dare look a court of justice in the face, after having been made appear so notorious a villain. Come, gentlemen of the jury, this is a plain case; here is but one witness in a case of treason; therefore lay your heads together, and say *not guilty*.”

Mrs. Cellier was set at liberty, and Dangerfield was committed to occupy her cell in Newgate.<sup>1</sup>

When holding assizes in the country, he took every opportunity of proclaiming his slavish doctrines. Going the Oxford Circuit with Lord Chief Baron Atkyns, he told the grand jury that a petition from the Lord Mayor and citizens of London to the King, for calling a parliament was high treason. Atkyns on the contrary, affirmed “that the people might petition the King, and, so that it was done without tumult, it was lawful.” Scroggs, having peremptorily denied this, went on to say that “the King might prevent printing and publishing whatever he chose by proclamation.” Atkyns mildly remarked, “that such matters were fitter for parliament, and that, if the King could do this work of parliament, we were never like to have parliaments any more.” Scroggs, highly indignant, sent off a despatch to the King, stating the unconstitutional and treasonable language of Chief Baron Atkyns. This virtuous Judge was in consequence superseded, and remained in a private station till he was reinstated in his office after the Revolution.<sup>2</sup>

Before Scroggs was himself prosecuted and dismissed from his office with disgrace, he swelled the number of his delinquencies by an attack on the liberty of the press, which was more violent than any that had ever been attempted by the Star Chamber, and which, if it had been acquiesced in, would have effectually established despotism in this country. Here he was directly prompted by the Government, and it is surprising that this proceeding should so little have attracted the notice of historians who have dwelt upon the arbitrary measures of the reign of Charles II. The object was to put down all free discussions, and all complaints against misrule, by having, in addition to a licenser, a process of *injunction* against printing,—to be summarily enforced, without the intervention

<sup>1</sup> 7 St. Tr. 1013–1055.

<sup>2</sup> 5 Parl. Hist. 309.

of a jury, by fine, imprisonment, pillory, and whipping. There was then in extensive circulation a newspaper called "The Weekly Pacquet of Advice from Rome, or the History of Papacy," which reflected severely upon the religion now openly professed by the Duke of York and secretly embraced by the King himself. In Trinity Term, 1680, an application being made to the Court of King's Bench on the ground that this newspaper was libellous, Scroggs, with the assent of his brother Judges, granted a rule absolute in the first instance, forbidding the publication of it in future.<sup>1</sup> The editor and printer being served with the rule, the journal was suppressed till the matter was taken up in the House of Commons, and Scroggs was impeached.

The same term, he gave the crowning proof of his servility and contempt of law and of decency. Shaftesbury, to pave the way for the Exclusion Bill, resolved to prosecute the Duke of York as a "Popish recusant." The heir presumptive to the throne was clearly liable to this proceeding and to all the penalties, forfeitures, and disqualifications which it threatened, for he had been educated a Protestant, and, having lately returned from torturing the Covenanters in Scotland, he was in the habit of ostentatiously celebrating the rites of the Romish religion in his chapel in London. An indictment against him was [JUNE 16.] prepared in due form, and this was laid before the grand jury for the county of Middlesex by Lord Shaftesbury, along with Lord Russell, Lord Cavendish, Lord Grey de Werke, and other members of the country party. This alarming news being brought to Scroggs while sitting on the bench, he instantly ordered the grand jury to attend in court. The bailiff found them examining the first witness in support of the indictment; but they obeyed orders. As soon as they had entered the court, the Chief Justice said to them, "Gentlemen of the grand jury, you are discharged, and the country is much obliged to you for your services."

It would have been consolatory to us, in reading an account of the base actions of Scroggs, if we could have looked forward to his suffering on a scaffold like Tresilian, or dying ignominiously in the Tower of London like Jeffreys. He escaped the full measure of retribution which he deserved, but he did not go unpunished.

There were two classes whom he had offended, of very different character and power,—the witnesses in support of the Popish Plot, and the Exclusionist leaders. The first began by preferring Articles against him to the King in Council, which alleged, among other things, that at the trial of Sir George Wakeman "he did brow-beat and curb Dr. Titus Oates and Captain Bedloe, two of the principal witnesses for the King, and encourage the jury impannelled to try the malefactors to disbelieve the said witnesses, by speaking of them slightly and abusively, and by omitting material parts of their evidence: That the said Chief Justice, to manifest his slighting opinion of the evidence of the said Dr.

<sup>1</sup> "Die Mercurii proxima post tres septimanas Sanctæ Trinitatis Anno 32 Car. II. Regis Ordinatum est quod Liber intitulat. *The Weekly Pacquet of Advice from Rome, or the History of Popery*, non ulterius imprimatur vel publicetur per aliquam personam quamcunque. *Per Cur.*"—8 *St. Tr.* 198.

Titus Oates and Captain Bedloe in the presence of his most sacred Majesty and the Lords of his Majesty's most honorable Privy Council, did dare to say that Dr. Titus Oates and Captain Bedloe always had an accusation ready against any body : That the said Lord Chief Justice is very much addicted to swearing and cursing in his common discourse, and to drink to excess, to the great disparagement of the dignity and gravity of his office."

It seems surprising that such charges from such a quarter, against so high a magistrate, should have been entertained, although he held his office during the pleasure of the Crown. The probability is that, being in favor with the Government, it was considered to be the most dextrous course to give him the opportunity of being tried before a tribunal by which he was sure of being acquitted, in the hope that his acquittal would save him from the fangs of an enraged House of Commons.

He was required to put in an answer to the Articles, and a day was appointed for hearing the case. When it came on, to give great *eclat* to the certain triumph of the accused, the King presided in person. Oates and Bedloe were heard, but they and their witnesses were constantly interrupted and stopped, on the ground that they were stating what was not evidence, or what was irrelevant; and, after a very eloquent and witty speech from the Chief Justice, in the course of which he caused much merriment by comments on his supposed immoralities, judgment was given that the complaints against him were false and frivolous.

But Shaftesbury was not so easily to be diverted from his revenge. [Nov. 23.] On the meeting of parliament, he caused a motion to be made in the House of Commons for an inquiry into the conduct of Lord Chief Justice Scroggs in discharging the Middlesex grand jury and in other matters. A committee was accordingly appointed, which presented a report recommending that he should be [Dec. 23.] impeached. The report was adopted by a large majority, and Articles of Impeachment were voted against him. These were *eight* in number. The *first* charged in general terms "that the said William Scroggs, Chief Justice of the King's Bench, had traitorously and wickedly endeavored to subvert the fundamental laws, and the established religion and government of the kingdom of England." The *second* was for illegally discharging the grand jury, "whereby the course of justice was stopped maliciously and designedly,—the presentments of many Papists and other offenders were obstructed,—and in particular a bill of indictment against James Duke of York, which was then before them, was prevented from being proceeded upon." The *third* was founded on the illegal order for suppressing the Weekly Pacquet newspaper. The three following articles were for granting general warrants, for imposing arbitrary fines, and for illegally refusing bail. The *seventh* charged him with defaming and scandalizing the witnesses who proved the Popish Plot. The *last* was in these words: "VIII. Whereas the said Sir William Scroggs, being advanced to be Chief Justice of the Court of King's Bench, ought, by a sober, grave, and vir-



tuous conversation, to have given a good example to the King's liege people, and to demean himself answerable to the dignity of so eminent a station; yet, on the contrary thereof, he doth, by his frequent and notorious excesses and debaucheries, and his profane and atheistical discourses, daily affront Almighty God, dishonor his Majesty, give countenance and encouragement to all manner of vice and wickedness, and bring the highest scandal on the public justice of the kingdom."

These articles were carried to the House of Peers by Lord Cavendish, who there, in the name of all the Commons of England, impeached Chief Justice Scroggs for "high treason, [JAN. 7, 1681.] and other high crimes and misdemeanors."

The articles being read, the accused, who was present, sitting on the Judge's woolsack, was ordered to withdraw. A motion was then made that he be *committed*; but the previous question was moved and carried, and a motion for an address to suspend him from his office till his trial should be over was got rid of in the same manner. He was then called in, and ordered to find his bail in 10,000*l.*, to answer the articles of impeachment, and to prepare for his trial.

Luckily for him, at the end of three days the parliament was abruptly dissolved. It would have been difficult to make out that any of the charges amounted to *high treason*; but in those days men were not at all nice about such distinctions, and a dangerous but convenient doctrine prevailed, that, upon an impeachment, the two Houses of Parliament might retrospectively declare anything to be treason, according to their discretion, and punish it capitally. At any rate, considering that the influence of Shaftesbury in the Upper House was so great, and that Halifax and the respectable anti-exclusionists could not have defended or palliated the infamous conduct of Scroggs, had his case come to a hearing, he could not have got off without some very severe and degrading punishment.

Although he escaped a judicial sentence, his character was so blown upon, and juries regarded him with such horror and were so much inclined to go against his direction, that the Government found that he would obstruct instead of facilitating their designs against the Whig leaders, and that it was necessary to get rid of him. After the dissolution of the Oxford parliament the Court was completely triumphant, and, being possessed for a time of absolute power, had only to consider the most expedient means of perpetuating despotism, and wreaking vengeance on the friends of freedom. Before long, Russell, Sydney, and Shaftesbury were to be brought to trial, that their heads might pay the penalty of the Exclusion Bill; but if Scroggs should be their judge, any jury, whether inclined to Protestantism or to Popery, would probably acquit them.

Accordingly, in the beginning of April, to make room for one who, it was hoped, would have more influence with juries, and make the proceedings meditated against the City of London and other corporations pass off with less discredit, while he might be equally subservient, Sir William Scroggs was removed from his office of Chief Justice of the

King's Bench. So low had he fallen, that little regard was paid to his feelings, even by those for whom he had sacrificed his character and his peace of mind; and, instead of a "resignation on account of declining health," it was abruptly announced to him that a *supersedeas* had issued, and that SIR FRANCIS PEMBERTON, who had been a puisne judge under him, was to succeed him as Chief Justice.

His disgrace caused general joy in Westminster Hall, and over all England; for, as Jeffreys had not yet been clothed in ermine, the name of Scroggs was the by-word to express all that could be considered loathsome and odious in a judge.

He was allowed a small pension, or retired allowance, which he did not long enjoy. When cashiered, finding no sympathy from his own profession, or from any class of the community, he retired to a country house which he had purchased, called Weald Hall, near Brentwood, in Essex. Even here his evil fame caused him to be shunned. He was considered by the gentry to be without religion and without honor; while the peasantry, who had heard some vague rumors of his having put people to death, believed that he was a murderer, whispered stories of his having dealings with evil spirits, and took special care never to run the risk of meeting him after dark. His constitution was undermined by his dissolute habits; and, in old age, he was still a solitary selfish bachelor. After languishing, in great misery, till the 25th day of October, 1683, he then expired, without a relation or friend to close his eyes. He was buried in the parish church of South Wealde; the undertaker, the sexton, and the parson of the parish, alone attending the funeral. He left no descendants; and he must either have been the last of his race, or his collateral relations, ashamed of their connection with him, had changed their name,—for, since his death, there has been no Scroggs in Great Britain or Ireland. The word was long used by nurses to frighten children; and as long as our history is studied, or our language is spoken or read, it will call up the image of a base and bloody-minded villain. With honorable principles, and steady application, he might have been respected in his lifetime, and left an historical reputation behind him. "He was a person of very excellent and nimble parts,"<sup>1</sup> and he could both speak and write our language better than any lawyer of the 17th century, Francis Bacon alone excepted. He seems to have been little aware of the light in which his judicial conduct would be viewed; for it is a curious fact that the published Reports of the State Trials at which he presided were all revised and retouched by himself;<sup>2</sup> and his speeches, which fill us with amazement and horror, he expected would be regarded as proofs of his spirit and his genius. Thank Heaven, we have no such

<sup>1</sup> Wood.

<sup>2</sup> One of the charges against him was, that he made a traffic in selling to booksellers the exclusive right of publishing trials before him. It was said he bargained to receive 150 guineas for the Report of Sir George Wakeman's trial and 100 guineas more if it was not finished in one day.



men in our generation : it is better for us to contemplate dull, moral mediocrity, than profligate eccentricity, however brilliant it may be.<sup>1</sup>

Scroggs may be considered as having been of some use to his country, by making the character of a wicked judge so frightfully repulsive that he may have deterred many from giving way to his bad propensities.—Dean Swift says, “I have read somewhere of an Eastern king who put a judge to death for an iniquitous sentence, and ordered his hide to be stuffed into a cushion, and placed upon the tribunal for the son to sit on, who was preferred to his father’s office. I fancy such a memorial might not have been unuseful to a son of Sir William Scroggs; and that both he and his successors would often wriggle in their seats as long as the cushion lasted.”<sup>2</sup>

## CHAPTER XX.

### LIFE OF LORD CHIEF JUSTICE PEMBERTON.

THE career of our next Chief Justice is more chequered by extraordinary vicissitudes than that of any legal dignitary mentioned in the annals of Westminster Hall. While yet a youth, he had wasted his substance by riotous living, and incurred enormous debts. Without education, without character, without friends, a slave to the worst propensities and habits, he was deprived of his liberty and became the associate of the most profligate of mankind. As the law then stood, there were no means of ever obtaining his liberation without satisfying the demands of his creditors, and there seemed a certainty that he must sink deeper and deeper in misery and in depravity till he expired in his cell. But a prison served him for a school, for a university, and for an inn of court. Here he became an elegant scholar, a profound lawyer, and qualified to run the race of honorable rivalry with those who had taken full advantage of regular tuition and training. By his own exertions, while still a prisoner, he not only maintained himself creditably, but made an arrangement for the discharge of all his pecuniary engagements. Starting at the bar, though he was at first taunted as a “gaol-bird,” he was soon run after as a distinguished advocate; and he attained the highest honors of his profession. When he was placed on the bench and it might have been thought that his adventures were at an end, the remarkable strokes of adverse and auspicious fortune to which he was destined were only beginning. Thrice was he removed from high judicial situations, which he filled with credit, by the rude hand of arbitrary power. Again and again he recommenced pleading causes for clients in

<sup>1</sup> See 8 St. Tr. 163–224.

<sup>2</sup> Drapier’s Letters, No. V. See 2. Shower, 155.; 1 Ventris, 329. 354.; Macph. State Papers, i. 106.

the courts in which he had presided. After trying Lord Russell, he was counsel for the Seven Bishops. The Revolution brought him no repose. Having been punished by Charles II. and James II., for imputed judicial independence, and supposed leaning to liberal principles, he was sent to Newgate by the Convention Parliament on the charge of favoring despotism and violating the privileges of the House of Commons. His character, likewise, from its varied and delicate lights and shadows, presents an interesting subject for contemplation. We become a little tired of Hale, from his uniform goodness; and we are sure that, on every occasion, Scroggs will show himself sordid and cruel. There being no struggle in the mind of either of them, we may at last regard the one with apathy, and the other with unmixed disgust. Pemberton, when he entered public life, felt a passion for preferment, by which he was sometimes led to do what was wrong. But he had a conscience: when he transgressed the line of rectitude he was visited by remorse; and, though he yielded to compliances which he condemned, yet, rather than recklessly follow the example of some unscrupulous judges who were his contemporaries, he was willing to sacrifice the objects which were dearest to his heart. Thus he might have been addressed:—

. . . . "Thou wouldst be great;  
Art not without ambition; but without  
The illness should attend it. What thou wouldst highly,  
That wouldst thou holily; wouldst not play false,  
And yet wouldst wrongly win."

He was descended from the Pembertons of Pemberton in the county of Lancaster. His father, who was of a junior branch of that family, had been a merchant in London, and had died while still a young man, leaving a considerable fortune to be divided among five infant children. These were all carried off by the small-pox except Francis, in whom, therefore, the whole property centred. It would have been well for him if his mother had died at the same time for she was a silly woman, and spoiled him by excessive indulgence. After her husband's death, she took a house in the town of St. Alban's, where she had some relations; and young Frank was put to school there. His parts were very lively, and he could learn much in a little time; but he was sickly, and, under pretence of nursing him, she kept him almost constantly idle at home. At fifteen he could read and write pretty well, and had picked up a little smattering of Greek and Latin. He was then sent to [A. D. 1640.] Emanuel College, Cambridge,<sup>1</sup> and there he remained above four years; but, although he contrived to take the degree of B. A., it was remarked by his tutor, Dr. Benjamin Whitecote, that, "notwithstanding all the pains taken upon him, from his giddiness, and the difficulty of fixing his attention, when he left Cambridge, he had little more knowledge of books than he brought with him from St. Alban's."

To finish his education it was resolved to send him to an Inn of Court; and on the 14th of October, 1645, he was admitted a member of the

<sup>1</sup> Admitted 12th August, 1640.

Honorable Society of the Inner Temple.<sup>1</sup> There was no expectation of his following the law as a profession; but, the civil war being extinguished, young men of family and fortune again attended "Readings" and "Moots," that they might acquire enough of law to qualify them to manage their estates and to act as Justices of the Quorum.

While at Cambridge, although Pemberton had been idle and listless, his morals had remained uncontaminated; but he now made the acquaintance of a set of young men who initiated him in all sorts of debauchery. Several of them had, for a short time, carried arms for the King, and thought that they could still safely show their hatred of the Roundheads by outvying the licentiousness which had distinguished the Cavaliers when they were serving in the field. The following year Pemberton was of age, and, according to his [A. D. 1646.] father's will, he came into possession of his fortune. This was speedily known to his dissolute companions, some of whom were in great pecuniary difficulties and driven to live upon their wits. Besides taverns, theatres, and other such places of dissipation, they carried him to gaming-houses, engaged him in deep play, and, in the course of eighteen months, stript him of every Carolus he had in the world. More than this, they not only led him to contract large debts for clothes, wine, horses, &c., for his own use, but to become surety for them to tradesmen and money-changers. In consequence, his mortgaged lands were foreclosed or taken under *el gits*; judgments being [A. D. 1647-50.] entered upon the bonds and statutes which he gave to his creditors, all his moveables were swept away under *fi. fas.*; and at length a relentless Jew, who had lately returned into England, from which the race had been banished since the time of Edward I., sued out a *ca. sa.* against him for a large sum of money borrowed to pay a gaming debt, and shut him up in the Fleet.

He had not been sober for many weeks, and it was some time before he could fully understand where he was and what had befallen him. Amidst the squalor which surrounded him, he was surprised to find loud revelry going forward, and he recognized faces that he had seen in the haunts of vice which he had been in the habit of frequenting. He was obliged to pay the *garnish* which they demanded of him; but he resolutely refused to join in their orgies. He awoke, as it were, from a dream, and was at first almost entirely overpowered by the horrors of his situation. He used afterwards to relate "that some supernatural influence seemed to open his eyes, to support him, and to make a new man of him." He contrived to get a small dismal room for his own use, without a chum, and in this he shut himself up. He tasted nothing but the bread and water which were the prison allowance; and his share of some charitable doles arising from fees on the last day of term, and other such sources, he gave away to others. What we have chiefly to admire is, that he nobly resolved to supply the defects of his education,—to qualify

<sup>1</sup> He is described as son of Radulph Pemberton, of St. Alban's in the county of Herts, Esq.

himself for his profession,—to pay his debts by industry and economy,—and to make himself respected and useful in the world. The resolution was formed in a hot fit of enthusiasm, but it was persevered in with cool courage, unflinching steadiness, and brilliant success. He was able to borrow books by the kindness of a friend of his father's who came to visit him. Bitterly regretting the opportunities of improvement which he had neglected at school and at college, he devoted a certain number of hours daily to the classics and to the best English writers—taking particular delight in Shakspeare's plays, although the acting of them had ceased, and they were not yet generally read. The rest of his time he [A. D. 1650–52.] devoted to the YEAR-BOOKS, to the more modern Reports, to the Abridgments, and to the compiling of a huge Common-place Book for himself, which might have rivalled Brooke, Rolle, and Fitzherbert. His mode of life was observed with amazement and admiration by his fellow-prisoners, who, knowing that he was a Templar, and that he was studying law night and day, concluded that he must be deeply skilled in his profession, and from time to time came to consult him in their own affairs,—particularly about their disputes with their creditors.<sup>1</sup> He really was of essential service to them in arranging their accounts, in examining the process under which they were detained, and in advising applications to the courts for relief. They, by and by, called him the "Councillor" and the "Apprentice of the Law,"<sup>2</sup> and such as could afford it insisted on giving him fees for his advice. With these he bought books which it was necessary that he should always have by him for reference. To add to his fund for this purpose, he copied and drew law papers for the attorneys, receiving so much a folio for his performances. By these means he was even able to pay off some of the smallest and most troublesome of his creditors. Burnet, whose love of the marvellous sometimes betrays him into exaggeration, although his sincerity may generally be relied upon, says that Pemberton "lay *many years* in gaol;"<sup>3</sup> but according to the best information I have been able to obtain, the period did not exceed five years. He obtained his dis-

<sup>1</sup> The Fleet was then by far the most populous civil prison, for it not only contained the debtors of the Court of Common Pleas, but all who were committed by the Court of Chancery.

<sup>2</sup> This used to be the designation of barristers till they were made serjeants.

<sup>3</sup> The passage is curious: "His rise was so particular, that it is worth the being remembered. In his youth he mixed with such lewd company, that he quickly spent all he had, and ran so deep in debt, that he was cast into a gaol, where he lay *many years*; but he followed his studies so close in the gaol, that he became one of the ablest men of his profession."—*Own Times*, ii. 144. Roger North with much quaintness, adheres closer to the truth in his slight sketch of Pemberton: "This man's morals were very indifferent; for his beginnings were debauched, and his study and first practice in the gaol. For having been one of the fiercest town rakes, and spent more than he had of his own, his case forced him upon that expedient for a lodging; and there he made so good use of his leisure, and busied himself with the cases of his fellow collegiates, whom he informed and advised so skilfully, that he was reputed the most notable fellow within those walls; and, at length he came out a sharper at the law."—*Life of Guilford*, ii. 123.



charge by entering into a very rational arrangement with his principal creditors. After pointing out to them the utter impossibility of their being ever satisfied while he remained in custody, he explained to them the profitable career which was before him if he could recover his liberty, and he assured them of his determined purpose to pay them all every farthing that he owed them the moment that it was in his power to do so. Accordingly the Jew, after stipulating for compound interest, and taking a fresh security, signed a warrant for entering satisfaction, and, all the detainers being withdrawn, Pemberton could again see the green fields and breathe the pure air of heaven.<sup>1</sup>

The creditable employment of his time in prison became well known in the Inner Temple Hall, and he was welcomed there very cordially. Imprisonment for debt was by no means so degrading then as we are apt to suppose. Even so late as the reign of George III. a great leader of the Western Circuit was often obliged to avail himself of his privilege to be free from arrest; and I myself have conversed with men who remembered an eminent conveyancer, and an eminent special pleader, both continuing in very extensive business while confined in the King's Bench prison. Pemberton's errors were regarded as more venial from the recollection of his extreme youth when his debts had been contracted, and of the manner in which he had been led astray by bad company.

Having kept the requisite number of terms, and done all his exercises, on the 27th of November, 1654, he was called to the bar.<sup>2</sup> Although inclined to monarchical principles, he did not scruple to take the oath "to be true to the Commonwealth," and he practised successively under the republican Chief Justices Rolle, Clyn, and Newdigate.

His rise into business was rapid. He first got into practice in the Palace Court at Westminster,—next in the Court of King's Bench,—and before he had been seven years at the bar he had discharged all his debts, including principal and compound interest for the Jew—whom he now regarded as his best benefactor.

Soon after the Restoration he became intimate with Sir Jeffrey Palmer, the Attorney General, and was employed as his "Devil" [A. D. 1668.] to prepare indictments and argue demurrers. In a few years he was succeeded in this office by North (afterwards Lord Keeper

<sup>1</sup> At this time there were no "Rules of the Fleet," or district round the prison considered to be part of it; and all committed to it were kept *in salva et arcta custodia*. This was not the first instance of legal studies going on within the walls. The famous treatise called *FLETA* was written by a lawyer confined in the Fleet in the reign of Edward I.

<sup>2</sup> Books of Inner Temple—from which it appears that he was called to the bench on the 5th February, 1671, and was elected Reader on 21st of January, 1674. His arms are in the Inner Temple Hall, with the following inscription:

"Franciscus Pemberton A<sup>r</sup>  
 Serviens ad legem. Elect.  
 Lect. Quadra A<sup>o</sup> 1674."

I am indebted for this and much other valuable information to the kindness of Mr. Martin, the sub-treasurer of the Inner Temple.

Guilford;) but he still held briefs in all state prosecutions as counsel for the Crown. He was allowed to conduct the trial of the apprentices charged with high treason because they had pulled down some disorderly houses in Moorfields, the Attorney General himself being ashamed to appear in it. Pemberton contented himself with a brief statement of the facts, leaving to Lord Chief Justice Kelynge the odium and the ridicule of laying down the law.<sup>1</sup>

In Easter Term, 1675, he was called to the degree of Serjeant-at-law. From this time he seems to have been by far the most distinguished advocate practising at the English bar. He was leading counsel for the appellants in the famous appeals from the Court of Chancery to the House of Lords, in which members of the House of Commons were respondents.

Now arose a dispute between the two Houses for the possession of his body, which had nearly ended in civil war. In spite of a resolution of the House of Commons that it would be a breach of their privileges for any lawyer to act in these appeals, Serjeant Pemberton, with becoming spirit, appeared at the bar of the House of Lords and argued stoutly for his clients. The Commons therefore voted that he had been guilty of a breach of their privileges, and ordered him to be taken into custody by the Serjeant-at-arms; but as soon as the order had been executed, the Lords passed a counter-resolution that it was a breach [A. D. 1576.] of their privileges to molest him for doing his duty under their sanction,—and ordered the officer of their house, the Usher of the Black Rod, to set him at liberty. It so happened, that the two champions met in the Court of Requests when the Serjeant-at-arms was conducting Pemberton to safer custody. The Usher of the [A. D. 1675.] Black Rod, with his attendants, gave the assault on the Serjeant-at-arms, who fled ignominiously, and Pemberton was the prize of the victors. The Commons, in a fury, passed a violent resolution against the pusillanimity of their officer, and ordered that the man who had defied their power should be immediately recaptured. Serjeant Pemberton, not aware of this proceeding, and thinking that the danger was over, returned next morning to the practice of his profession in the Court of Common Pleas; but Speaker Seymour, who had been deeply mortified by the abasement of the assembly over which he presided, as he walked up Westminster Hall to occupy the chair, spied Serjeant Pemberton wearing his coif and party-colored robes,—ran up to him, seized him, and with the assistance of some messengers who were following in his train, lodged him in Little-Ease, the prison of the House of Commons,—from whence he was transferred to the Tower of London. The Lords next made an order on the Lieutenant of the Tower, requiring him to discharge the prisoner, and, when this was disobeyed, resorted to the novel expedient of issuing a writ of *habeas corpus* for bringing his body to their bar. The Commons, on the other hand, resolved “that no person committed by them for breach of privilege ought, by writ of *habeas corpus* or any other authority whatever, be



made to appear in the House of Lords; that the writ of *habeas corpus* issued by the Lords for bringing up the body of Serjeant Pemberton was insufficient and illegal; and that they would protect their Serjeant-at-arms, the Lieutenant of the Tower, and all others who should obey the law by conforming to their orders."

Shaftesbury, who had brought about this quarrel on purpose to prevent the passing of the Test Act, had gained his object. The next step would have been a battle royal between the members of the two Houses, and, notwithstanding the disparity of numbers on the side of the Lords, they would have had powerful assistance from the mob, who on this occasion approved of their proceedings. As the only means of obviating so great a calamity, the King suddenly put an end to the session by a prorogation, and Serjeant Pemberton was set at liberty. It was allowed that during the whole affair he had conducted himself with perfect propriety, and he now stood very high in public estimation.<sup>1</sup>

Although he felt a great desire for political advancement, he would not enter the House of Commons, and he could not make up his mind boldly to join either of the contending parties. He highly disapproved of the profligate measures of the CABAL, and the succeeding administrations were little more to his mind; but he considered Shaftesbury, the leader of the patriots, as the most unprincipled statesman of the times, and he would sooner have died in obscurity than enlist under his banner. On the contrary, he professed a respect for the Earl of Danby, and he was loud in bestowing praise on Lord Chancellor Nottingham, who had proved himself the reformer, or rather founder, of our Equity code.

With such scruples and such moderation, there seemed as yet little chance of his ever being made a Chief Justice in those violent times; but, enjoying much reputation [APRIL 30, 1679.] as a lawyer, and having given no offence to either side, there was little surprise expressed when he was made a Puisne Judge of the King's Bench, and was knighted. The object of his promotion probably was to support the dignity of that Court which had been very much lowered by the ignorance and brutality of Chief Justice Scroggs.

Sir Francis gave satisfaction both as a Civil and Criminal Judge. In the former capacity, he caused some grumbling among the old staggers by showing, as they alleged, too little respect for precedent and authority; but he was deeply versed in jurisprudence as a science, and he thought it better to be governed by a right principle than by a wrong decision. He sat both in the King's Bench and at the Old Bailey, on the trial of the principal persons said to be implicated in the Popish Plot.

Sometimes he gently interfered to mitigate the ferocity of his Chief, —as when he prevailed in having a chair placed for a prisoner at the bar who was unable to stand;<sup>2</sup> and when he got off a bookseller, convicted

<sup>1</sup> 7 St. Tr. 1121-1188.

<sup>2</sup> 7 St. Tr. 832.

of publishing a libel, with fine, imprisonment, and pillory,—when Scroggs wished likewise to have whipped publicly at the cart's tail.<sup>1</sup> But he never took a bold part in seeking to discredit false witnesses and to save innocent lives. He thought that there was some foundation for the story of the Popish Plot, although it might be greatly exaggerated. For this reason, he would not join Scroggs when that miscreant, to please the Government, suddenly wheeled round, and represented Oates and Bedloe as evil spirits, after having hailed them as guardian angels. Thus he gave mortal offence, not only to Scroggs personally, but to the Government, and in less than two years from the time of his appointment he was angrily dismissed.<sup>2</sup>

He returned to the bar, and practised in the Common Pleas before [FEB. 17, 1680.] Lord Chief Justice North. Says Roger,—“However some of his brethren were apt to insult him, his Lordship was always careful to repress such indecencies; and not only protected, but used him with much humanity: for nothing is so sure a sign of a bad breed as insulting over the depressed.”<sup>3</sup>

He immediately recovered his practice, and was in higher estimation than ever. But, with his usual caution, he refrained from taking part in the tremendous struggle which now arose respecting the exclusion of the Duke of York from the throne; saying, “that it was the part of a good subject to respect hereditary right, and to leave any question for altering hereditary succession to the King and the Parliament.”

On his leaving the King's Bench, that court fell into deeper and deeper disrepute; and, that the state prosecutions meditated after the [A. D. 1681.] King's triumph on the dissolution of the Oxford parliament might be carried on with any chance of success, it was indispensably necessary that a new Chief Justice should be substituted in the place of Scroggs. After long deliberations and doubt, it was resolved to offer the place to Sir Francis Pemberton. Much reliance was placed on his gratitude, if he should receive so high a favor; and it was hoped that his fair character might insure him extraordinary weight with juries. On receiving Lord Nottingham's letter, announcing the King's commands, his perplexity was greater than his pleasure. He was not ignorant that Fitzharris's trial for high treason was pending; that it involved an important question of privilege between the Crown and the House of Commons; that it was sure to be followed by others in which the King was passionately eager to succeed; and that the Whigs against whom they were to be directed, although at present prostrate, were still the heads of a powerful party. He saw at a glance the delicate and difficult situations in which, as the first Criminal Judge of the land, he was sure to be placed; dismissal threatening him on one hand, impeach-

<sup>1</sup> 7 St. Tr. 932.

<sup>2</sup> Burnet says that “he was turned out entirely by Scroggs' means;” but offence was taken by the ministers, that he did not sufficiently run at the Popish Plot, which the King now ventured openly to ridicule.

<sup>3</sup> Life of Guilford, ii. 125. The biographer, with his usual inaccuracy, refers to Pemberton's second return to the bar after Guilford, holding the great seal, had ceased to preside in the Common Pleas.

ment on the other. Knowing himself, he dreaded the struggles in his own breast,—his want of moral courage,—and the peril of his doing something dishonorable, of which he might for ever after repent. But to renounce the glory after which he had so long aspired, of having his name enrolled among the Chief Justices of England,—to lose the opportunity of making himself a name as a great magistrate,—to forego the hope of being able to amend the administration of the law, by enlightening and softening the Government, which as it was now strong, might easily afford to be merciful,—while he might be obscurely wrangling at the bar with brother serjeants, to see an unprincipled rival grasp the preferment!—He sat down, wrote an acceptance, and on the first day of Easter Term, 1681, he was installed in the office with the usual solemnities.<sup>1</sup>

He was hardly warm in his seat, when Fitzharris' trial for high treason came on before him; and although he had been promoted chiefly that he might conduct it with partiality, he finished it to the King's entire satisfaction, and without any damage to his own character.

Fitzharris was a consummate scoundrel, who had offered himself as a witness to both parties, who had deceived both parties, and whom both parties had wished to hang;—the courtiers, by indictment for high treason, according to the course of the common law,—the exclusionists, by parliamentary impeachment. At the Oxford Parliament, the impeachment was voted by the Commons, and rejected by the Lords; and two days afterwards came the dissolution.

In the month of April following, the Attorney General prepared a bill of indictment for high treason, to be presented to the grand jury of the county of Middlesex. In charging the grand jury, the Chief Justice said, "You ought not, and cannot, take any notice of any votes of the House of Commons. You are sworn to inquire of the matters given you in charge. By the opinion of all the Judges you are bound to find a true bill, if there be evidence enough before you to prove the charge."

The prisoner having afterwards pleaded the pendency of the impeachment in abatement, by way of showing that the Court of King's Bench had not jurisdiction to try him, and the Attorney General having demurred, the question was argued at prodigious length. One Judge was inclined in favor of the plea, but it was overruled, Pemberton merely saying, "My brother Jones and my brother Raymond agree with me that it is bad."

Upon the merits a strong case was made out against Fitzharris on his own confessions, for he had pretended to be an accomplice in the Popish Plot, and his scheme had been to make money by falsely accusing himself and others. It was likewise proved against him that he had printed a pamphlet advising that the King should be assassinated. He represented that he had been employed as a spy by the Government to distribute it among obnoxious persons, who were to be apprehended with copies of it in their pockets; and he called as his witness the Duchess of Portsmouth, who acknowledged that the King had given him money, although she

<sup>1</sup> 2 Shower, 159. ; 1 Ventris, 354.

swore that it was purely as a gratuity. Fitzharris was convicted and executed.

The trial was by no means creditable to any of those who were concerned in it; but I cannot say that any peculiar blame was imputable to Chief Justice Pemberton, for, during the whole proceeding, he perfectly preserved his temper, he laid down no bad law, and he cannot be accused of having perverted the facts. Yet he must have had a suspicion that the case apparently made out for the Crown, was founded on collusion and artifice; and, although he so managed the trial as to escape public censure, his recollection of it must have caused him a pang for the rest of his days.<sup>1</sup>

In the next important case which was tried before him he cannot be said to have violated the law, but his conduct was discreditable to him and to his country. The most Reverend Dr. Oliver Plunket, titular Archbishop of Armagh, and Primate of the Roman Catholic Church in Ireland, a man of splendid abilities, profound learning, unblemished life, genuine piety, and, what is more to the purpose, of unquestionable loyalty,—who was not only venerated by those of his own religious persuasion, but, having under four successive Lord Lieutenants exerted himself to preserve the peace of the country and to foster English connection, was respected by all enlightened Protestants,—had been accused of being engaged in an Irish Popish Plot, which was invented in imitation of that which had enjoyed such prodigious success in England. Instead of assassinating the King, burning London, &c., on which Oates and Bedloe had often dilated, their associates imputed to the Irish Catholic Primate that he had invited a French army to land at Carlingford, that he had enrolled and trained 70,000 native Irishmen to join it, and that, with the combined force, all Protestants in the island were to be extirpated, and Ireland was to be created into an independent Catholic state. There were absurdities and impossibilities in this plan so palpable, that no one, with local knowledge upon the subject, could have believed in its existence; and the prelate must have been safe in the hands of any Irish jury. Therefore,—under an English act of parliament, passed the reign of Henry VIII., which gave a right to try in England high treason committed in any of the dominions of the Crown,—after he had been confined some months in Dublin, he was brought over to London in bonds, and lodged in Newgate. A prosecution for high treason was then commenced against him before the Court of King's Bench at Westminster.

On his arraignment, he pointed out the extreme hardship and injustice of being carried away from his native land, and brought to be tried among strangers, who were not only ignorant of his character, but were very imperfectly acquainted with localities, circumstances, and customs, upon which the credibility of the witnesses against him must greatly depend, and who might have a strong prejudice against him, his country, and his religion:—

*Pemberton, C. J.*: “Mr. Plunket, you shall have as fair a trial as if



you were in Ireland. You are here by a statute not made on purpose to bring you into a snare, but an ancient statute, and not without precedents of its having been put in execution before your time; for your own country will tell you of O'Rourke and several others that have been arraigned and condemned here for treason done there. Your trial shall be by honest persons according to the laws which obtain in this kingdom."

The Archbishop prayed that his trial might be postponed for ten days, because, by reason of adverse winds, his witnesses had not arrived; but he was told by the Chief Justice that a longer time had been allowed him to prepare for trial than was usual in such cases. Thus commenced the address of Sir Robert Sawyer, the Attorney General:—"May it please your Lordships, and you, gentlemen of the jury, the character this gentleman bears, as a primate under a foreign and usurped jurisdiction, will be a great inducement to you to give credit to that evidence which we shall produce before you to prove his guilt. He obtained this very preferment upon a promise to raise 60,000 men in Ireland for the Pope's service, to settle Popery there, and to subvert the government." And in the same strain he continued, without any check from the bench. It was in vain that the Archbishop pointed out the utter impossibility of a French army being landed at Carlingford and the preposterous nature of the charge that he had drilled 70,000 armed men, as he had only used spiritual weapons against impiety and vice. The fatal verdict being recorded, Chief Justice Pemberton thus pronounced sentence:—

"Look you, Mr. Plunket, you have been here indicted of a very great and heinous crime—the greatest and most heinous of all crimes—and that is, high treason; and, truly, yours is of the highest nature; it is a treason, in truth, against God and your King, and the country where you lived. You have done as much as you could to dishonor God in this case; for the bottom of your treason was, your setting up your false religion, than which there is not anything more displeasing to God or more pernicious to mankind, a religion which is ten times worse than all the heathenish superstitions, the most dishonorable and derogatory to God and his glory of all religions or pretended religions whatsoever, for it undertakes to dispense with God's laws, and to pardon the breach of them; so that, certainly, a greater crime there cannot be committed against God, than for a man to encourage its propagation. I do now wish you to consider, that you are near your end. It seems you have lived in a false religion hitherto; but it is not too late at any time to repent. I trust you may have the grace to do so. In the mean time, there is no room for us to grant you any kind of mercy, though I tell you we are inclined to pity all malefactors." *Archbishop*: "If I were a man such as your Lordship conceives me to be, not thinking of God Almighty or heaven or hell, I might have saved my life, for it has been often offered to me if I would confess my own guilt and accuse others, but, my Lord, I would sooner die ten thousand deaths." *Chief Justice*: "I am sorry to see you persist in the principles of that false religion which you profess." *Archbishop*: "These, my Lord, are principles that God Almighty himself cannot dispense withal." *Chief Justice*: "Well,

however that may be, the judgment which we must give you is that which the law prescribes, 'you must go from hence to the place from whence you came, that is Newgate, and from thence you shall be drawn through the city of London to Tyburn; there you shall be hanged by the neck, but cut down before you are dead,'” &c. &c. *Archbishop*: “I hope I may have this favor, for a servant and some few friends now to be with me.” *Chief Justice*: “I know nothing to the contrary. But I would advise you to have some minister to come to you, some Protestant minister. We wish better to you than you do to yourself.” *Archbishop*: “God Almighty bless your Lordship! And now, my Lord, as I am a dead man to this world, and as I hope for mercy in the next, I was never guilty of any of the treasons laid to my charge, as you will know in due time.”

The sacraments having been administered to him according to the rites of his church by a brother convict, the Archbishop was, a few days afterwards, drawn through the streets of London on a hurdle, and, having again protested his innocence and forgiven his enemies, he was put to death with all the revolting cruelties enumerated to him when he received sentence. Protestant zeal only desired one addition to the sacrifice—that the victim should have been decked in full canonicals as Popish Primate of all Ireland.<sup>1</sup>

For some unaccountable reason, the Government was incensed against Plunket, and therefore Pemberton convicted him according to the rules of law. Mr. Fox observes, that “the King, even after the dissolution of his best parliament, when he had so far subdued his enemies as to be no longer under any apprehensions from them, did not think it worth while to save the life of Plunket, of whose innocence no doubt could be entertained.”<sup>2</sup>

I now come to the most exceptionable passage in the life of Chief Justice Pemberton. While the King was nearly indifferent about Plunket, he was more eager than he had ever been in pursuit of any object during his reign,—to bring Shaftesbury to the scaffold; and this he knew would be accomplished as soon as he could get a bill of indictment found against him by a grand jury, for the doomed patriot would then have perished by a partial selection of peers in the Court of the Lord High Steward. To induce the grand jurors to find the bill, Pemberton, although as a lawyer, he was well aware that they ought first to have had a *primâ facie* case of guilt made out, thus addressed them:—

“Look, ye, gentlemen, I must tell you that which is referred to you is to consider whether there be any reason or ground for the King to call to account those who are accused; if there be probable ground, it is as much as you can inquire into. Where there is no kind of suspicion of a crime, nor reason to believe that the thing can be proved, it is not for the King’s honor to call men to account; but a probable cause is enough. As it is a crime to condemn innocent persons, so it is a crime as great to acquit the guilty. That God who requires the one, requires both; and let me tell you, if any of you shall be refractory, and will not

<sup>1</sup> 8 St. Tr. 447–500.

<sup>2</sup> Fox’s History of James II.



find a bill where there is a probable ground for an accusation, you do thereby intercept justice, and make yourselves criminals."

Contrary to usage and law, he further ruled that the witnesses on whose evidence the grand jury were to act should be examined in open court; and, in conjunction with North, who outbid him in servility, he resorted to the most unworthy arts of intimidation and cajolery to obtain the finding of a *true bill*; but the juries were still returned by Whig sheriffs, the franchises of the City of London remaining in force. The bill was returned *IGNORAMUS*, and Shaftesbury was saved.<sup>1</sup> There is no more striking proof of the depraved state of public morality in those days than that, after such an instance of dastardly compliance with the wishes of the King, Pemberton should still have been considered a judge to be respected, by comparison, for independence and integrity.

Whether he thought that, on the last occasion, he had gone too far to please the Government, and now wished to seize an opportunity of putting on a show of impartiality, I know not; but, on the trial of Lord Grey de Werke, indicted before him for carrying off and seducing the Lady Harriet Berkeley, daughter of the Earl of Berkeley,—although the King was desirous of a conviction because the defendant was a Whig, Chief Justice Pemberton conducted himself unexceptionably. He properly ruled that the young lady herself was a competent witness; and, in summing up to the jury, he said:—

"The question before you is, whether there was any unlawful solicitation of this lady's love, and whether there was any inveiglement of her to withdraw herself and run away from her father's home without his consent, and whether my Lord Grey did frequent her company afterwards? Her mother and sisters make out a strong case to support the indictment; but she denies it all, and I must leave it to you which story you will believe."

After the trial was over, Pemberton, with great spirit, quelled a riot which arose in Westminster Hall respecting the custody of the Lady Harriet, her father laying hold of her against [A. D. 1682.] her will, and she, in collusion with her paramour, pretending that she was married to another man, who claimed her. Swords were drawn, and a conflict was begun, but the Chief Justice sternly rebuked the combatants, and by his interposition tranquillity was restored without effusion of blood.<sup>2</sup>

It might have been supposed that the King and his ministers would have had confidence in Chief Justice Pemberton, but, in spite of the zealous assistance he had given in the plan to hang Lord Shaftesbury, he

<sup>1</sup> 8 St. Tr. 759–842.; Lives of Chancellors, iii. ch. xc.

<sup>2</sup> 9 St. Tr. 127–186. Macaulay describes this as "a scene unparalleled in our legal history. The seducer appeared with dauntless front, accompanied by his paramour. Nor did the Whig Lords flinch from their friend's side even in that extremity. In our time such a trial would be fatal to the character of a public man; but in that age the standard of morality among the great was so low, and party spirit was so violent, that Grey, still continued to have a considerable influence, though the Puritans, who formed a strong section of the Whig party, looked somewhat coldly upon him."—Vol. i. p. 529, 530.

was now removed from his office as untrustworthy. While the charters of the City of London remained by which the citizens were empowered to elect sheriffs, who returned juries both for the City of London and for the County of Middlesex, there was no certainty that the best endeavors of the most obsequious judges to cut off Whig leaders might not be rendered abortive by a conscientious verdict. A *quo warranto* suit had, therefore, been instituted, for the purpose of having all the charters of the City declared forfeited, so that the King might remodel its municipal constitution in the way best calculated to gain his own ends. This suit had been advised by the subtlest of special pleaders—EDMUND SAUNDERS, and he had drawn the *quo warranto*, and conducted all the proceedings as counsel for the Crown to the stage where it was ripe for being finally argued and determined in the Court of King's Bench. The constitution of the country was supposed to depend upon the result. If the citadel of freedom should be taken in the assault, despotism would be permanently established; but failure would revive agitation, and might render the calling of a parliament indispensable.

Every thing depended on the Chief Justice of the King's Bench. Had the prosecution been well founded, Pemberton would have been very readily trusted with it; but, unfortunately, all lawyers knew that if the slightest regard were paid to the principles of law or to former decisions, there must be judgment in favor of the City of London. The courtiers were aware that Pemberton was not entirely devoid of conscience, and that there were limits to his aberrations from rectitude beyond which he would not trespass. To give him a chance, he was sounded by the Attorney General, in a manner not unusual, respecting the *quo warranto* against the City,—when he returned an ambiguous answer.

The bold resolution was taken to cashier him, and to substitute for him EDMUND SAUNDERS, about whom there could be no misgiving. Notwithstanding Pemberton's merits and past services, he would at once have been reduced to the ranks, but it luckily happened that the inferior office of Chief Justice of the Common Pleas was vacant. This was offered to him as a *solatium*, and he had the meanness to accept it. Sir Thomas Raymond, in giving an account of Saunders' installation, says, "he was placed Chief Justice of the said Court in the room of Sir Francis Pemberton, who was the day before sworn Chief Justice of the Common Pleas *at his own* desire, for that it is a place (tho' not so honorable) yet of more ease and plenty, as the Lord Keeper said in his speech to Saunders."<sup>1</sup> But, says Roger North, who had a spite against Pemberton, "the truth is, it was not thought any way reasonable to trust that cause, on which the peace of the government so much depended, to a chief who never showed so much regard to the law as to his will, and notorious as he was for little honesty, boldness, cunning, and uncontrollable opinion of himself." It may be amusing to read his arguments by which such proceedings were gravely and unblushingly defended:—

"It will be proper to solve a question much tossed about in those days, whether the Court was not to blame for appointing men to places of

<sup>1</sup> Sir T. Raymond, 473.

judgment where great matters of law and of mighty consequence depended to be heard and determined, whose opinions were known beforehand. All governments must be entrusted with power, which may be used to good or ill purpose. Here a government is beset with enemies ever watching for opportunities to destroy it, and having a power to choose whom to trust, the taking up men whose principles are not known is more than an even chance that enemies are taken into their bosom. Would they not be sure of men to judge whose understandings and principles were foreknown? What is the use of power but to secure justice? It is a maxim of law, that *fraud is not to be assigned in lawful acts*. If governments secure their peace by doing only what is lawful to be done, all is right. If they suffer encroachments, and at length dissolution, for want of using such powers, what will it be called but stupidity and folly?"<sup>1</sup>

Sir Francis Pemberton being thus removed from the office of Chief Justice of the King's Bench to make way for one who not only had never been in office before and had not even worn a silk gown, but besides was of the lowest origin and of the most vulgar habits—felt the degradation keenly, and, instead of rejoicing in his slender integrity, expressed regret that he had not been more uniformly complying. But if he was to walk behind Saunders, who had "nine issues in his back," it was some consolation to him that he was to be still "My Lord," and to receive higher emoluments than he could expect at the bar. He was sworn in Chief Justice of the Common Pleas, [JAN. 13.] at the Lord Chancellor's private house,—to avoid speeches in open court, which might have been very awkward on both sides.<sup>2</sup>

The QUO WARRANTO proceeded. Judgment was given against the City; all its charters, granted by so many sovereigns, were declared to be forfeited; all its privileges were annihilated; and the Government had now the unlimited power of packing juries in London and Middlesex.<sup>3</sup>

But Saunders had lost his life in the wound which he had inflicted on the constitution, and the office of Chief Justice of the King's Bench was again vacant. It might have been [A. D. 1683.] restored to Pemberton had there not been another candidate for it, who was destined to throw into the shade all past judicial delinquency.—Some months intervened before the new law arrangements could be completed. In this interval the Rye-house Plot was discovered, and, those implicated in it being about to be tried, Pemberton was placed at the head of the Commission, the Government thinking that, notwithstanding his secret resentment, he had motives sufficient to keep him steady in the hope of restitution and the dread of further disgrace.

The case of Colonel Walcot was taken first; and here there was no difficulty, for he had not only joined in planning an insurrection against the Government, but was privy to the design of assassinating the King and the Duke of York, and, in a letter to the Secretary of State, he had confessed his complicity, and offered to become a witness for the Crown.

<sup>1</sup> Life of Guilford, ii. 121.

<sup>2</sup> Sir Thomas Raymond, 251.; Burnet, O. T. ii. 185. 188.

<sup>3</sup> 8 St. Tr. 1039.

This trial was meant to prepare the public mind for that of Lord Russell, the great ornament of the Whig party, who had carried the Exclusion Bill through the House of Commons, and, attended by a great following of Whig members, had delivered it with his own hand to the Lord Chancellor at the bar of the House of Lords. In proportion to his virtues was the desire to wreak vengeance upon him. But the object was no less difficult than desirable, for he had been kept profoundly ignorant of the intention to offer violence to the royal brothers, from the certainty that he would have rejected it with abhorrence; and although he had been present when there were deliberations respecting the right and the expediency of resistance by force to the Government after the system had been established of ruling without parliaments, he had never concurred in the opinion that there were no longer constitutional means of redress,—much less had he concerted an armed insurrection. Notwithstanding all the efforts made to return a prejudiced jury, there were serious apprehensions of an acquittal.

Pemberton, the presiding Judge, seems to have been convinced that [JULY 13.] the evidence against him was insufficient; and although he did not interpose with becoming vigor, by repressing the unfair arts of Jeffreys who was leading counsel for the Crown, and although he did not stop the prosecution as an independent judge would do in modern times, he cannot be accused of any perversion of law; and, instead of treating the prisoner with brutality, as was wished and expected, he behaved to him with courtesy and seeming kindness.

Lord Russell, on his arraignment at the sitting of the Court in the morning, having prayed that the trial should be postponed till the afternoon, as a witness for him was absent, and it had been usual in such case to allow an interval between the arraignment and the trial, Pemberton said, "Why may not this trial be respited till the afternoon?" and the only answer being the insolent exclamation "Pray call the jury," he mildly added, "My Lord, the King's counsel think it not reasonable to put off the trial longer, and we cannot put it off without their consent in this case."

The following dialogue then took place, which introduced the touching display of female tenderness and heroism of the celebrated Rachel, Lady Russell assisting her martyred husband during his trial—a subject often illustrated both by the pen and the pencil.

*Lord Russell*: "My Lord, may I not have the use of pen, ink, and paper?" *Pemberton*: "Yes, my Lord." *Lord Russell*: "My Lord, may I not make use of any papers I have?" *Pemberton*: "Yes, by all means." *Lord Russell*: "May I have somebody write to help my memory?" *Attorney General*: "Yes, a servant." *Lord Russell*: "My wife is here, my Lord, to do it." *Pemberton*: "If my Lady please to give herself the trouble."

The Chief Justice admitted Dr. Burnet, Dr. Tillotson, and other witnesses, to speak to the good character and loyal conversation of the prisoner, and gave weight to their testimony, notwithstanding the observation of Jeffreys that "it was easy to express a regard for the King



while conspiring to murder him." In summing up to the jury, after alluding to the witness called by the prisoner "concerning his integrity and course of life," he said,—

"Now, the question before you will be, whether, upon this whole matter, you do believe my Lord Russell had any design upon the King's life, for that is the material part here. It is given you by the King's counsel as an evidence of this, that he did conspire to raise an insurrection, and to surprise the King's guards, which, say they, can have no other end but to seize and destroy the King. It must be left to you upon the whole matter. You have not evidence in this case as you had in that tried yesterday, of a conspiracy to kill the King at the Rye.—There, direct evidence was given of a consult to kill the King, which you have not here. If you believe the prisoner at the bar to have conspired the death of the King, and in order to that to have had the consults the witnesses speak of, you must find him guilty of the treason laid to his charge."

The jury retired, and the courtiers present were in a state of the greatest alarm; for against Algernon Sydney, who was to be tried next, the case was still weaker; and if the two Whig chiefs, who were considered already cut off, should recover their liberty, and should renew their agitation, a national cry might be got up for the summoning of Parliament, and a new effort might be made to rescue the country from a Popish successor. These fears were vain. The jury returned a verdict of GUILTY, and Lord Russell expiated on the scaffold the crime of trying to preserve the religion and liberties of his country.

But Pemberton was not to be forgiven the anxiety he had occasioned. Notwithstanding the want of moral courage and the subserviency he had displayed during Lord Russell's trial, complaint was truly made that hitherto there never had been an instance of a state offender, whom the Government were desirous of convicting, being treated with so much moderation, and being allowed such a fair chance of escaping. It was determined that Sydney should be tried before a Judge who would make sure work of him, and that as Pemberton had not taken warning by his removal from the office of Chief Justice of the King's Bench, and as he was so irreclaimably irresolute that no dependence could be placed upon him, he should be for ever deprived of all judicial employment.—Accordingly a *supersedeas* passed the great seal, by which he was dismissed from the office of Chief Justice of the Common Pleas; Jones, untroubled by scruples, was appointed to succeed him; and Jeffreys, promoted to be Chief Justice of the King's Bench, was the remorseless murderer of Sydney.<sup>1</sup> At the same time Pem- [SEPT. 29.] berton was expelled from the Privy Council, into which he had been admitted a member when he was made Chief Justice of the King's Bench.

Before I again accompany him to the bar, I ought to say something of his decisions in civil cases while he remained on the bench. Roger

<sup>1</sup> 2 Shower, 318.

North's grudge against him, for having a hankering after honesty and independence, leads him to say "he was a better practiser than a judge; for he had a towering opinion of his own sense and wisdom, and rather made than declared law: I have heard his lordship say, that *in making law he had outdone King, Lords, and Commons.*" This jocular boast he very likely made, for it is quite consistent with his having done his duty as an enlightened magistrate. With us, the rules of property fixed by act of parliament bear an infinitesimally small proportion to those fixed by the common law, and the common law is made up of judicial decisions. New combinations of facts are constantly arising and producing new questions of law; the determination of each of these may be considered a new law, for it lays down a rule to be followed in time to come, and the reports of our courts of justice are far more voluminous than the statute book. Pemberton did not publish any of his own judgments, and he was by no means fortunate in having a good reporter; but, making allowance for the inaccuracies and the barbarous dialect of *Ventris*, *Shower*, *Sir Thomas Jones*, and *Sir Thomas Raymond*, he seems to have proceeded generally on sound principles of jurisprudence, and by no means to have been wanting in respect for the authority of his predecessors. The only bad decisions to be laid to his charge are those against the privileges of the House of Commons, for which he was punished by the Convention Parliament, and which it will afterwards be my duty to explain.

He was particularly celebrated as a good *nisi prius* judge. Sir Henry Chauncey says, "He would not suffer lawyers, on trials before him, to interrupt or banter witnesses in their evidence, but allowed every person liberty to recollect their thoughts, and to speak without fear, that the truth might be better discovered."<sup>1</sup>

Although he was now in his sixtieth year, he resolved the third time in his life to begin to practise at the bar; and having been several years a Chief Justice, and called LORD PEMBERTON,<sup>2</sup> he became once more *Mr. Serjeant*.

He immediately again got into extensive business, and he was engaged in the most important trials which took place, both civil and criminal, till the landing of the Prince of Orange—a period of five years. He sat usually in the Common Pleas, but he occasionally went into the King's Bench, and practised before Jeffreys, notwithstanding their former squabbles when Pemberton was on the bench and Jeffreys was at the bar.<sup>3</sup>

The grand trial coming on which proximately produced the Revolution, the ex-Chief Justice was counsel for the Seven Bishops, along with [A. D. 1688.] a strange mixture of counsel of different parties and principles—Sawyer and Finch, who as Attorney and Solicitor General for Charles II., had prosecuted Russell and Sydney; Pollexfen, the Whig leader of the Western Circuit, who had shared with Jeffreys

<sup>1</sup> See Clutterbuck's *Herts*, i. 82.

<sup>2</sup> The Chiefs were Lords simply by their surnames. Hence we speak at this day of Lord Coke, Lord Hale, and Lord Holt.

<sup>3</sup> 10 St. Tr. 567.



the obloquy of the "Bloody Assizes;" Levinz, who, returning to the bar when displaced from the bench for a show of independence, was now induced to take a brief against the Crown by a threat of the attorneys that, if he refused it, he should never hold another; Treby, the ex-Recorder of London, who had been turned out when the City was disfranchised; and Somers, hitherto only known for learning and ability by a few private friends,—hereafter to be immortalized as the author of the Bill of Rights, and the chief founder of the constitutional government under which we now live. They forgot all past differences and animosities, and nobly struggled in defence of their illustrious clients. In ex-Chief Justice Pemberton was seen a wonderful union of zeal, discretion, learning, and eloquence, and "through the whole trial he did his duty manfully and ably."<sup>1</sup>

The first point which he made, when the Bishops were brought from the Tower and charged with the information, was,—that they were illegally in custody, and therefore were not then [JUNE 15.] bound to plead."

*Pemberton, Serjeant*: "Good my Lord, will you please to hear us a little to this matter?" *L. C. J.*: "Brother Pemberton, we will not refuse to hear you—by no means—but not now; for the King is pleased, by his Attorney and Solicitor General, to charge these noble persons, my Lords the Bishops, with an information." *Pemberton, Serjt*: "Pray, my Lord, spare us a word: if we are not here as prisoners regularly before your Lordship, and are not brought in by due process, the Court has not power to charge us with the information; therefore we beg to be heard on the question, whether we are legally here before you?"

The objection being overruled, Pemberton offered a plea to be put upon the record "that the defendants, as peers of parliament, were privileged from arrest in such a case;" but this the Court refused to receive, and the Bishops were obliged to plead *not guilty*.

When the jury had been sworn, the charge was opened against the defendants that they had written and published, in the county of Middlesex, a false, malicious, and seditious libel [JUNE 20.] (meaning the respectful Petition which they had presented to the King, praying that his Majesty would recall his order for the clergy to read the Declaration of Indulgence, issued contrary to the Test Act).<sup>2</sup> But the first difficulty was to prove their signatures to the Petition, and an acquittal was about to take place, when the Crown counsel put into the witness-box Mr. Blathwayt, the clerk of the Council, who swore that, when they were summoned before the King, they owned their signatures to the Petition; but Pemberton insisted, in cross-examination, upon having all that had passed between the King and the Bishops fully stated:—

<sup>1</sup> Macaulay's History, i. 379.

<sup>2</sup> The information stated a conspiracy to defame the King, alleging the writing and publication of the libel as the overt act; but notwithstanding this technicality, which is hardly worth noticing, the prosecution was in reality for writing and publishing the libel, and is so treated throughout the whole trial.

*Williams, S. G.* : "That is a pretty thing, indeed!" *Powys, A. G.* : "Do you think you are at liberty to ask our witnesses any impertinent question that comes into your head?" *Pemberton* : "The witness is sworn to tell the truth, and the whole truth, and an answer we must and will have." *Powys, A. G.* : "If you persist in asking such a question, tell us, at least, what use you mean to make of it." *Pemberton, Serjt.* : "My Lords, I will answer Mr. Attorney. I will deal plainly with the Court. If the Bishops owned this paper under a promise from his Majesty that their confession should not be used against them, I hope that no unfair advantage will be taken of them." *Williams, S. G.* : "You put on his Majesty what I dare hardly name. Since you are so pressing, I demand for the King that the question may be recorded." *Pemberton* : "Record what you will, I am not afraid of you, Mr. Solicitor."<sup>1</sup>

After a long altercation, the questions were allowed to be put; and it appeared from the answers that, although the King had made no express promise that advantage should not be taken of the admission of the Bishops, they had admitted their handwriting on this understanding. The signatures were held to be proved.

But a still greater difficulty arose in showing that there had been any publication of the supposed libel in the county of Middlesex:—

*Pemberton, Serjt.* : "To say the writing and subscribing of their names is a publication of that paper, is such doctrine truly as I never heard before. Suppose this paper had been in my study subscribed by me, but never went further, would this have been a publication? but the publication must be proved to have been in the county of Middlesex." *Powys, A. G.* : "Look you; it does lie upon you to prove it was done elsewhere than in Middlesex." *Pemberton, Serjt.* : "Sure, Mr. Attorney is in jest." *L. C. J.* : "Pray, brother Pemberton be quiet. If Mr. Attorney says anything he ought not to say, I will correct him; but pray do not, you who are at the bar, interrupt another."

The Court having finally ruled that there was not sufficient evidence of a publication in Middlesex, the Chief Justice was beginning to direct the jury to find a verdict of acquittal, when Finch, one of the counsel for the Bishops, offered to adduce evidence for the defendants. Pemberton, seeing the gross indiscretion of this proceeding, started on his legs, pulled down his junior, and said—

"My Lord, we are contented that your Lordship should direct the jury." *L. C. J.* : "No! no! I will hear Mr. Finch. The Bishops shall not say of me, that I would not hear their counsel." *Pemberton, Serjt.* : "Pray, good my Lord, we stand mightily uneasy here, and so do the jury. Pray dismiss us."

But for Finch's foolish interruption, the anticipated acquittal would

<sup>1</sup> At this time, leading questions were not allowed to be put in cross-examination, more than in examination in chief; and I am not sure that the old rule is not the best one—when I consider the monstrous abuse sometimes practised in putting words into the mouth of a friendly witness, necessarily called by the side he is opposed to.

then have been recorded. At this moment it was announced that the Earl of Sunderland, the Lord President, was coming into court to prove that the Bishops had, in his presence, presented the petition to the King at Whitehall. *L. C. J.* : "Well, you see what comes of interruption."

After Lord Sunderland's evidence, nothing remained except the question of *libel or no libel*? Pemberton, when on the bench, had concurred with the other judges in the doctrine that this was a question exclusively for the Court, and that the jury had nothing more to consider than whether, in point of fact, the writing alleged to be libellous had been composed and published by the defendants.<sup>1</sup> But, in spite of his own ruling, he insisted that, although the Bishops had been proved to have composed and published the Petition, they were entitled to a verdict of *not guilty* from the jury.

"My Lords the Bishops," said he, "are here accused of a crime of a very heinous nature; they are here branded and stigmatised by this information as if they were seditious libellers; when, in truth they have done no more than their duty, their duty to God, their duty to the King, and their duty to the Church. We insist that the kings of England have no power to suspend or dispense with the laws and statutes of this kingdom touching religion; that is what we stand upon for our defence. And we say, that such a dispensing power with laws and statutes strikes at the very foundation of all the rights, liberties, and properties of the King's subjects whatsoever. If the King may suspend the laws of the land which concern our religion, I am sure there is no other law but he may suspend; and if the King may suspend all the laws of the kingdom, what a condition are all the subjects in for their lives, liberties, and properties!—all at mercy. The King's legal prerogatives are as much for the advantage of his subjects as of himself, and no man goes about to speak against them; but, under pretence of legal prerogative, to extend this power of the King to the destruction of all his subjects, would be doing him no true service. These laws are in truth the great bulwark of the reformed religion; they are in truth, that which fenceth the Church of England, and we have no human protection besides. They were made upon a foresight of the mischief that had and might come by false religions in this kingdom—and were intended to keep them out—particularly to keep out the Romish religion, which is the very worst of all religions.<sup>2</sup> If this Declaration of Indulgence, against which the Bishops made a dutiful representation, should take effect, what would be the end of it? All religions are encouraged, let them be what they will—Ranters, Quakers, and the like,—nay, even Popery, which was intended by these acts of parliament to be kept out of this nation, as a religion no way tolerable, and not to be endured here. We say this farther, that my Lords the Bishops have the care of the Church by their

<sup>1</sup> See *Rex v. Harris*, 7 St. Tr. 930.,—the case in which, approving of Scroggs's law, he objected to whipping being part of the sentence.

<sup>2</sup> This must have been very distasteful to Mr. Justice Allybone, sitting before him on the bench, who, although a Papist, had been made a judge of the King's Bench by virtue of this supposed dispensing power.

very function and offices, and are bound to take care to keep out all those false religions which are prohibited and designed to be kept out by the law; and, seeing that this declaration was founded upon a mere pretended power which had been continually opposed and rejected in parliament, they could not comply with the King's commands to read it."

He then went into an historical discussion respecting the *dispensing power*, showing that as often as it had been claimed in matters of religion it had been denied and abandoned. Coming to the last attempt in the reign of Charles II., he was proceeding,—“Afterwards, in 1672, the King was prevailed upon to grant another dispensation somewhat larger —.” *L. C. J.*: “Brother Pemberton, I would not interrupt you, but we have heard of this over and over again already.” Pemberton, perceiving that the jury were strongly with him, dexterously said, “Then, since your Lordship is satisfied of all these things, as I presume you are (else I should have gone on), I have done, my Lord.”

The other counsel exerted themselves with much boldness and vigor, but the victory which followed was chiefly to be ascribed to Pemberton, who having reputably presided as Chief Justice of the Court, was regarded with far more respect by the jury than his infamous successor, Sir Robert Wright, and was still supposed to be laying down the law with judicial authority.<sup>1</sup>

It might have been expected that, having taken so bold a part during this trial, he would have signed the invitation to the Prince of Orange, which was sent off immediately after; but his heart failed him. He was paralyzed by his scruples respecting the sin of rebellion and the perils to which he might subject himself if he should join in any unsuccessful attempt at resistance to arbitrary rule. He therefore continued to devote himself exclusively to his professional pursuits. Even after the Prince of Orange had landed he remained perfectly neutral, and he declined a seat in the Convention Parliament.

When William and Mary were on the throne, and new judges were to be appointed in the room of those who disgraced the bench at the end of the reign of James II., it was expected by many that Pemberton would have been restored along with Atkyns and John Powell, who had been removed for their honesty during the last two reigns; but, although his services in defending the Seven Bishops were duly appreciated, and it was acknowledged that, when compared with Jeffreys and Scroggs, he was a paragon of virtue, it could not be forgotten that from timidity, if not corruption, he had assisted the Government in their design to bring the Earl of Shaftesbury to the block, and that although he had wished to save Lord Russell he had allowed him to be sacrificed. Indeed, the attainder of this illustrious patriot being now reversed by act of parliament as unlawful, there would have been much awkwardness in replacing

<sup>1</sup> 12 St. Tr. 183–433. My professional friends may be curious to know what his fees were on this occasion. From the attorney's bill it appears that he received five guineas retainer, twenty guineas with his brief, and three guineas for a consultation. Sir R. Sawyer and Mr. Finch refused to take any fee.



on the bench the judge by whom it was pronounced. Therefore, when the members of the Cabinet produced their lists of twelve men to preside in the common law courts in Westminster Hall, Pemberton's name was found in a very few of them; and in the new judicial arrangement, which gave such general satisfaction, he was entirely passed over. [MAY 1, 1689.]

An inquiry being afterwards instituted into the manner in which judges had recently been tampered with and cashiered, he was examined before the House of Commons, but could or would give very little information on the subject. While others described very amusing scenes at Chiffinch's private room at Whitehall, where they had secret interviews with Charles and James, and were interrogated respecting the dispensing power, the King's prerogative to control the law by proclamations, and the judgment they were prepared to give in cases which were pending, they could get Pemberton to say nothing more than "I was removed out of my place without visible cause the first time; neither do I know the reason of my being removed from the King's Bench to the Common Pleas. I was never sent for to Whitehall nor to my Lord Chancellor's. The night before, my lord said nothing to me, but the next morning I had a *supersedeas*."<sup>1</sup> Whether he had given offence by sulkiness I know not, but a resolution was now taken to treat him with great rigor.

Mr. Topham, the Serjeant-at-arms of the House of Commons, presented a petition, setting forth "that several vexatious actions had been brought against him for executing the orders of the House when Sir Francis Pemberton was Chief Justice of the King's Bench, and that, although he had pleaded that he acted under the authority of the House, he had been cast in damages and costs." The petition was referred to a select committee, who reported that the judgments given against the Serjeant-at-arms were illegal, and a violation of the privileges of Parliament. Sir Francis Pemberton was thereupon ordered to attend at the bar. The treatment which he experienced on this occasion [JULY 18.] has been severely condemned; but I must confess that his demeanor was not very straightforward or dignified. The Speaker having informed him that he was sent for to state the ground on which he had overruled the plea in *Jay v. Topham*,—instead of denying, like Holt, the right of either House of Parliament to interrogate him in this irregular manner, or frankly stating what had happened, he equivocated, and the following dialogue grieved his friends:—

*Pemberton*: "Sir, I know nothing of this action. I have been out of the court now six years, I cannot remember so many thousand actions as were brought at that time. But if you will let me know what the charge is, I do not doubt but I can give you a good account of it.

*Speaker*: "A plea was pleaded that the defendant acted by the authority of this House, and such plea you overruled." *Pemberton*: "This is quite new to me, for I knew not what I was sent for." *Speaker*: "The House desires to know on what ground, in the case of *Jay v. Topham*, you overruled the defendant's plea." *Pemberton*: "I think



he pleaded to the jurisdiction of the Court; and if he did, with submission the plea ought to have been overruled." *Speaker*: "The House doth require your reasons for maintaining this opinion." *Pemberton*: "I will give you my reasons as well as I can; but you cannot expect I should be furnished with such reasons now as I may state upon further consideration. I must premise that I do not think that your privileges are in question. There is no judge who understands himself but will allow the privileges of the House; they are the privileges of the nation, and we are all bound to maintain them as much as any member of the House. But the question is all *de modo*—whether the authority of the House is pleadable to the jurisdiction of the Court, or in bar? And, under favor, I have always taken it that such a defence is not pleadable in abatement. The question is, whether this shall stop the Court, so that they cannot examine into the facts,—and see whether such a warrant was signed by the Speaker, as is alleged. Any man living might plead such a plea."

Time was given to inquire into the pleadings in *Jay v. Topham*, and the ex-Chief Justice was ordered to attend again.

When he next appeared, he insisted that the plea had been to the jurisdiction of the Court; and he added, "We did not [JULY 19.] question the legality of your orders, but we were to see whether the orders had been given, and whether they had been properly obeyed. If Mr. Topham arrested the plaintiff without any order, or imprisoned him till he paid a sum of money, damages ought to be awarded. If I was mistaken in this case, it was an error of my judgment. My design was to do justice."

The record is not to be found (as it ought to be) in the Treasury of the King's Bench, having been produced on this occasion at the bar of the House of Commons and not returned to the proper custody; but there is every reason to believe that the plea was substantially a plea in bar, and that it had been improperly overruled. Chief Justice Pemberton happened to be then oscillating towards the Government, which was highly incensed against the popular leaders, and entertained a strong desire to put down parliamentary privilege. The House of Commons (Maynard, Somers, and other learned and just men, being present) passed a resolution that Sir Francis Pemberton, in giving this judgment, had been guilty of a breach of privilege, and ordered him to be taken into custody. In consequence he was committed to Newgate, and he remained a close prisoner there till the 14th day of March, 1690—a period of eight months—when, the session being at last terminated by a prorogation, he was discharged.

Considering his great eminence as an advocate, the high judicial offices which he had filled, and the noble battle he had waged in the cause of freedom when defending the Seven Bishops, it is impossible not to commiserate his fate. But the leaders of the Convention Parliament have been too rashly blamed for the punishment inflicted upon him.—Lord Ellenborough said, in *Burdett v. Abbott*, "It is surprising how a judge could have been questioned and committed to prison, by the House

of Commons, for having given a judgment which no judge who ever sat in this place could differ from. It was after the Revolution—which makes such a commitment for such a cause a little alarming. It must be recollected that Lord Chief Justice Pemberton stood under the disadvantage at that period of having been one of the Judges who sat on the trial of Lord Russell. He was a man of eminent learning, and, being no favorite with either party at that time, for he was shortly after that trial removed from his situation, was probably an honest man.”<sup>1</sup>—And Lord Erskine, having alluded in a debate in the House of Lords to this commitment of Lord Chief Justice Pemberton, exclaimed, with much vehemence, “If a similar attack were made upon my noble and learned friend (Lord Ellenborough) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones, and blood.”<sup>2</sup> But there can be little doubt that Pemberton, who was ever deficient in moral courage, for the purpose of screening himself, misrepresented the plea; and that, however meritorious his services at other times may have been, on this occasion he well deserved the punishment inflicted upon him.<sup>3</sup>

On recovering his liberty, he once more returned to the bar; but now, enfeebled by age, and not supposed to have “the ear of the Court,” he was very little employed. He had a beautiful villa near Highgate, where he spent the greatest part of his time in seclusion. So late, however, as the year 1696, he was one of the counsel for Sir John Fenwick, and assisted in opposing the bill of attainder by which that unfortunate gentleman was put to death in a manner which would have been condemned in the worst days of the Stuarts.<sup>4</sup> This was the last occasion of Sir Francis Pemberton ever appearing in public.

Soon after, he altogether withdrew from business, and the last three years of his life he entirely devoted to contemplation. He expired on the 10th of June, 1699, in the 74th year of his age, and was buried in Highgate church, where there still stands a monument erected to his memory, with the following inscription:—

“M. S. venerabilis admodum viri D. Francisci Pemberton Eq. auratit, servientis ad legem, e sociis Interioris Templi, necnon sub serenissimo principe Carolo 2<sup>o</sup>. Banci Regii ac Communis Capitalis Justiciarii, sacræ majestati a secretioribus consiliis; vir plané egregius, ad reipublicæ pariter ac suorum dulce decus et presidium feliciter natus. Patre Radulpho in Agro Hertford. Generoso, ex antiquâ Pembertonorum prosapiâ in Cum. Palat. Lancastriæ oriundo.”<sup>5</sup>

With a little more firmness of principle, or moral courage, joined to his talents, acquirements, and opportunities, he might have been a great character in English history; but, while he perceived and approved the right course, and never entirely abandoned it, he not unfrequently deviated from it,—so that among his contemporaries he bore the contemned

<sup>1</sup> 14 East, 104.

<sup>2</sup> 16 Parl. Deb. 851.

<sup>3</sup> See 2. Nels. Ab. 1248.; Lord Campbell's Speeches, 206. <sup>4</sup> 13 St. Tr. 587-758.

<sup>5</sup> Lysons' Environs, p. 68; Clutterbuck's Herts, ii. 449. He left several sons behind him; and his descendants were seated at Trumpington, near Cambridge, till the beginning of the present century.

name of a "trimmer," and his reputation with his posterity has been neither pure nor brilliant. The errors of his youth would have been easily forgiven after the noble amends which he made for them, but we cannot praise the excessive caution with which he ever conducted himself that he might not give offence to those in power; and although we feel pity rather than indignation when his virtue falters, he occasionally submitted to compliances, for the purpose of winning and retaining office, which utterly deprives him of our esteem. If any thing could have made him appear a respectable judge, it would have been a comparison with the four Chief Justices who succeeded him.

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## CHAPTER XXI.

### LIFE OF LORD CHIEF JUSTICE SAUNDERS.

THERE never was a more flagrant abuse of the prerogative of the Crown than the appointment of a Chief Justice of the King's Bench for the undisguised purpose of giving judgment for the destruction of the charters of the City of London, as a step to the establishment of despotism over the land. Sir Edmund Saunders accomplished this task effectually, and would, without scruple or remorse, have given any other illegal judgment required of him by a corrupt Government. Yet I feel inclined to treat his failings with lenience, and those who become acquainted with his character are apt to have a lurking kindness for him. From the disadvantages of his birth and breeding, he had little moral discipline; and he not only showed wonderful talents, but very amiable social qualities. His rise was most extraordinary, and he may be considered as our *legal Whittington*.

"He was at first," says Roger North, "no better than a poor beggar-boy, if not a parish foundling without known parents or relations." There can be no doubt that, when a boy, he was discovered wandering about the streets of London in the most destitute condition—penniless, friendless—without having learned any trade, without having received any education. But although his parentage was unknown to the contemporaries with whom he lived when he had advanced himself in the world, recent inquiries have ascertained that he was born in the parish of Barnwood, close by the city of Gloucester; and his father, who was above the lowest rank of life, died when he was an infant, and that his mother took for her second husband a man of the name of Gregory, to whom she bore several children. We know nothing more respecting him, with certainty, till he presented himself in the metropolis; and we are left to imagine that he might have been driven to roam abroad for subsistence, by reason of his mother's cottage being levelled to the ground during

the siege of Gloucester; or that, being hardly used by his stepfather, he had run away, and had accompanied the broad-wheeled wagon to London, where he had heard that riches and plenty abounded.

The little fugitive found shelter in Clement's Inn, where "he lived by obsequiousness, and courting the attornies' clerks for scraps."<sup>1</sup> He began as an errand-boy, and his remarkable diligence and obliging disposition created a general interest in his favor. Expressing an eager ambition to learn to write, one of the attornies of the Inn got a board knocked up at a window on the top of a staircase. This was his desk, and, sitting here, he not only learned the *running hand* of the time, but *court hand*, *black letter*, and *ingrossing*, and made himself "an expert entering clerk." In winter, while at work, he covered his shoulders with a blanket, tied hay-bands round his legs, and made the blood circulate through his fingers by rubbing them when they grew stiff. His next step was to copy deeds and law papers, at so much a folio or page,—by which he was enabled to procure for himself wholesome food and decent clothes. Meanwhile he not only picked up a knowledge of Norman French, and law Latin, but, by borrowing books, acquired a deep insight into the principles of conveyancing and special pleading. By and by the friends he had acquired enabled him to take a small chamber, to furnish it, and to begin business on his own account as a conveyancer and special pleader. But it was in the latter department that he took greatest delight, and was the most skilful—inasmuch that he gained the reputation of being familiarly acquainted with all its mysteries; and although the order of "special pleaders under the bar" was not established till many years after, he was much resorted to by attorneys who wished by a sham plea to get over the term, or by a subtle replication to take an undue advantage of the defendant.

It has been untruly said of him, as of Jeffreys, that he began to practise as a barrister without ever having been called to the bar. In truth, the attorneys who consulted him having observed to him that they should like to have his assistance to maintain in court the astute devices which he recommended, and which duller men did not comprehend, or were ashamed of, he, rather unwillingly, listened to their suggestion that he should be entered of an Inn of Court, for he never cared much for great profits or high offices; and having money enough to buy beer and tobacco, the only luxuries in which he wished to indulge, he would have preferred to continue the huggermugger life which he now led. He was domesticated in the family of a tailor in Butcher Row, near Temple Bar,<sup>2</sup> and was supposed to be rather too intimate with the mistress of the house. However, without giving up his lodging here, to which he resolutely stuck till he was made Lord Chief Justice of England, he was prevailed upon to enter as a Member of the Middle Temple. Accordingly, on the 4th of July, 1660, he was admitted there by the description

<sup>1</sup> Life of Guilford, ii. 125.

<sup>2</sup> This was a very narrow dirty lane, which was swept away when the improvements were made between St. Clement's Church and Temple Bar, about forty years ago.



of "Mr. Edward Saunders, of the county of the city of Gloucester, gentleman." The omission to mention the name of his father might have given rise to the report that he was a foundling; but a statement of parentage on such occasions, though usual, was not absolutely required, as it now is.

He henceforth attended "moots," and excited great admiration by his readiness in putting cases and taking of objections. By his extraordinary good-humor and joviality, he likewise stood high in the favor of his brother Templars. The term of study was then seven years, liable to be abridged on proof of proficiency; and the benchers of the Middle Temple had the discernment and the liberality to call Saunders to the bar when his name had been on their books little more than four years.

We have a striking proof of the rapidity with which he rushed into full business. He compiled Reports of the decisions [Nov. 15, 1664.] of the Court of King's Bench, beginning with Michaelmas Term, 18 Charles II., A. D. 1666, when he had only been two years at the bar. These he continued till Easter Term, 24 [A. D. 1666-71.] Charles II., A. D. 1672. They contain all the cases of the slightest importance which came before the Court during that period; and he was counsel in every one of them.

His "hold of business" appears the more wonderful when we consider that his *liaison* with the tailor's wife was well known, and might have been expected to damage him even in those profligate times; and that he occasionally indulged to great excess in drinking, so that he must often have come into court very little acquainted with his "breviat," and must have trusted to his quickness in finding out the questions to be argued, and to his storehouses of learning for the apposite authorities.

But, when we peruse his "Reports," the mystery is solved. There is no such treat for a common lawyer. Lord Mansfield called him the "Terence of reporters," and he certainly supports the forensic dialogue with exquisite art, displaying infinite skill himself in the points which he makes, and the manner in which he defends them; doing ample justice at the same time, to the ingenuity and learning of his antagonist. Considering the barbarous dialect in which he wrote (for the Norman French was restored with Charles II.,) it is marvellous to observe what a clear, terse, and epigrammatic style he uses on the most abstruse juridical topics.

He labored under the imputation of being fond of sharp practice, and he was several times rebuked by the Court for being "*trop subtile*," or "going too near the wind;" but he was said by his admirers to be fond of his *craft* only in *meliori sensu*, or in the good sense of the word, and that, in entrapping the opposite party, he was actuated by a love of fun rather than a love of fraud.<sup>1</sup> Thus is he characterized, as a practitioner, by Roger North:—

<sup>1</sup> I knew such a man in my youth. Having demurred four times successively to a very faulty declaration, assigning only one blunder for cause of demurrer each time, the author of the declaration sent him a challenge as for a personal insult; when he merely returned for answer,—“Dear Tom, I fight only in *Banco*



“Wit and repartee in an affected rusticity were natural to him. He was ever ready, and never at a loss, and none came so near as he to be a match for Serjeant Maynard. His great dexterity was in the art of special pleading, and he would lay snares that often caught his superiors, who were not aware of his traps. [A. D. 1671–80.] And he was so fond of success for his clients, that, rather than fail, he would set the Court hard with a trick; for which he met sometimes with a reprimand, which he would wittily ward off, so that no one was much offended with him. But Hale could not bear his irregularity of life; and for that, and suspicion of his tricks, used to bear hard upon him in the court. But no ill usage from the bench was too hard for his hold of business, being such as scarce any could do but himself.”<sup>1</sup>

He did not, like Scroggs and Jeffreys, intrigue for advancement. He neither sought favor with the popular leaders in the City, nor tried to be introduced into Chiffinch’s “spie office” at Whitehall. “In no time did he lean to faction, but did his business without offence to any. He put off officious talk of government and politics with jests, and so made his wit a catholicon or shield to cover all his weak places and infirmities.”<sup>2</sup> He was in the habit of laughing both at Cavaliers and Roundheads; and, though nothing of a Puritan himself, the semi-popish high-churchmen were often the objects of his satire.

His professional, or rather his special pleading, reputation forced on him the advancement which he did not covet. Towards the end of the reign of Charles II., when the courts of justice were turned into instruments of tyranny, (or, as it was mildly said, “the Court fell into a steady course of using the law against all kinds of offenders,”) Saunders had a general retainer from the Crown, and was specially employed in drawing indictments against Whigs, and *quo warrantos* against Whiggish corporations.<sup>3</sup> In Crown cases he really considered the King as his client, and was as eager to gain the day for him, by all sorts of manœuvres, as he had ever been for a roguish Clement’s Inn attorney. He it was that suggested the mode of proceeding against Lord Shaftesbury [A. D. 1680.] for high treason: on his recommendation the experiment was made of examining the witnesses before the grand jury in open court, —and he suggested the subtlety that “the usual secrecy observed being for the King’s benefit, it might be waived by the King at His pleasure.” When the important day arrived, he himself interrogated very artfully Mr. Blathwayt, the clerk of the Council, who was called to produce the papers which had been seized at Lord Shaftesbury’s house in Aldersgate-street, and gave a treasonable tinge to all that passed. The IGNORAMUS of his indictment must have been a heavy disappointment to him; but

*Regis.* Why should you not suppose that I might be as dull as yourself, and that it took me some time to find out the blunders which had escaped you? When I came to one which was decisive, there I stopped, presuming that what followed must be all right. Your loving friend, E. L.”

<sup>1</sup> Life of Guilford, ii. 127.

<sup>2</sup> *Ib.* 128.

<sup>3</sup> He had discontinued his Reports, partly from want of leisure, and partly from disliking to report the decisions of such judges as Raynsford and Scroggs.

the effort which he made gave high satisfaction to the King, who knighted him on the occasion, and from that time looked forward to him as a worthy Chief Justice.<sup>1</sup>

Upon the dissolution of the Oxford Parliament and the rout of the Whig party, it being resolved to hang Fitzharris, Saunders argued with uncommon zeal against the prisoner's plea that there was an impeachment depending for the same offence; and concluded his legal argument in a manner which seems to us very inconsistent with the calmness of a dry legal argument: "Let him plead *guilty* or *not guilty*: I rather hope that he is *not guilty* than he is *guilty*: but if he be *guilty*, it is the most horrid venomous treason ever spread abroad in any age. And for that reason your Lordships will not give countenance to any delay."<sup>2</sup>

I find him several times retained as counsel against the Crown; but upon these occasions the Government wished for an acquittal. He defended the persons who were prosecuted for attempting to throw discredit on the Popish Plot,<sup>3</sup> he was assigned as one of the counsel for Lord Viscount Stafford,<sup>4</sup> and he supported the application made by the Earl of Danby to be discharged out of custody.<sup>5</sup> On this last occasion he got into a violent altercation with Lord Chief Justice Pemberton. The report says that "Mr. Saunders had hardly begun to speak when the Lord Chief Justice Pemberton did reprimand the said Mr. Saunders for having offered to impose upon the Court. To all which Mr. Saunders replied, that he humbly begged his Lordship's pardon, but he did believe that the rest of his brethren understood the matter as he did." The Earl of Danby supported this statement, and Saunders had a complete triumph over the Chief Justice.<sup>6</sup>

Pemberton was soon removed from the office of Chief Justice of the King's Bench, and Saunders sat in his place.

In spite of the victory which the King had gained over the Whigs at the dissolution of his last parliament, he found one obstacle remain to the perpetuation of his despotic sway in the franchises of the City of London. The citizens (among whom were then included all the great merchants, and some of the nobility and gentry) were still empowered to elect their own magistrates; they were entitled to hold public meetings; and they could rely upon the pure administration of justice by impartial juries, should they be prosecuted by the Government. The Attorney and Solicitor General, being consulted, acknowledged that it passed their skill to find a remedy; but, a case being laid before Saunders, he advised that something should be discovered which might be set up as a forfeiture of the City charters, and that a QUO WARRANTO should be brought against the citizens, calling upon them to show by what authority they presumed to act as a corporation. Nothing bearing the color even of irregularity could be suggested against them except that, on the rebuilding and enlarging of the markets after the great fire, a by-law had been made, requiring those who exposed cattle and goods to contribute to the

<sup>1</sup> 8 St. Tr. 779.

<sup>4</sup> 7 Ib. 1242.

<sup>2</sup> Ib. 271.

<sup>5</sup> 11 Ib. 831,

<sup>3</sup> 7 Ib. 906.

<sup>6</sup> 11 Ib. 831.

expense of the improvements by the payment of a small toll ; and that the Lord Mayor, Aldermen, and Commonalty of the City had, in the year 1679, presented a petition to the King lamenting the prorogation of parliament in the following terms : " Your petitioners are greatly surprised at the late prorogation, whereby the prosecution of the public justice of the kingdom, and the making of necessary provisions for the preservation of your Majesty and your Protestant subjects, have received interruption."

Saunders allowed that these grounds of forfeiture were rather scanty, but undertook to make out the *BY-LAW* to be the usurpation of a power to impose taxes without authority of Parliament, and the *PETITION* a seditious interference with the just prerogative [A. D. 1683.] of the Crown.

Accordingly, the *QUO WARRANTO* was sued out, and, to the plea setting forth the charters under which the citizens of London exercised their privileges as a corporation, he drew an ingenious replication, averring that the citizens had forfeited their charters by usurping a power to impose taxes without authority of Parliament, and by seditiously interfering with the just prerogative of the Crown. The written pleadings ended in a demurrer, by which the sufficiency of the replication was referred, as a question of law, to the judgment of the Court of King's Bench.

Saunders was preparing himself to argue the case as counsel for the Crown, when, to his utter astonishment, he received a letter from the Lord Keeper announcing his Majesty's pleasure that he should be Chief Justice. He not only never had intrigued for the office, but his appointment to it had never entered his imagination ; and he declared, probably with sincerity, that he would much sooner have remained at the bar, as he doubted whether he could continue to live with the tailor in Butcher Row, and he was afraid that all his favorite habits would be dislocated. This arrangement must have been suggested by cunning lawyers, who were distrustful of Pemberton, and were sure that Saunders might be relied upon. But Roger North ascribed it to Charles himself ; not attempting, however, to disguise the corrupt motive for it. " The King," says he, " observing him to be of a free disposition, loyal, friendly, and without greediness or guile, thought of him to be Chief Justice of the King's Bench *at that nice time*. And the ministry could not but approve of it. *So great a weight was then at stake as could not be trusted to men of doubtful principles, or such as anything might tempt to desert them.*"<sup>1</sup>

On the 23d of January, being the first day of Hilary Term, 1683, Sir Edmund Saunders appeared at the bar of the Court of Chancery, in obedience to a writ requiring him to take upon himself the degree of Serjeant-at-law ; and distributed the usual number of gold rings, of the accustomed weight and fineness, with the courtly motto "*PRINCIPI SIC PLACUIT*." He then had his coif put on, and proceeded to the bar of the Common Pleas, where he went through the form of pleading a sham cause as a Serjeant. Next he was marched to the bar of the King's

<sup>1</sup> Life of Guilford, ii. 129.

Bench, where he saw the Lord Keeper on the bench, who made him a flowery oration, pretending "that Sir Francis Pemberton, at his own request, had been allowed to resign the office of Chief Justice of that Court, and that his Majesty, looking only to the good of his subjects, had selected as a successor him who was allowed to be the fittest, not only for learning, but for every other qualification." The new Chief Justice, who often expressed a sincere dislike of *palaver*, contented himself with repeating the motto on his rings, *PRINCIPI SIC PLACUIT* ;" and, having taken the oaths, was placed on the bench, and at once began the business of the Court.<sup>1</sup>

In a few days afterwards came on to be argued the great case of *The King v. the Mayor and Commonalty of the City of London*. Fitch the Solicitor General, appeared for the Crown ; and Treby, the Recorder of London, for the defendants. The former was heard very favorably ; but the latter having contended that, even if the Bye-law and the Petition were illegal, they must be considered only as the acts of the individuals who had concurred in them, and could not affect the privileges of the body corporate—an *ens legis*, without a soul, and without the capacity of sinning,—Lord Chief Justice Saunders exclaimed—

"According to your notion, never was one corporate act done by them ; certainly, whatsoever the Common Council does, binds the whole ; otherwise it is impossible for you to do any corporate act, for you never do, and never can, convene all the citizens. Then you say your Petition is no reflection on the King, but it says that by the prorogation public justice was interrupted. If so, by whom was public justice interrupted ? Why, by the King ! And is it no reflection on the King, that, instead of distributing justice to his people, he prevents them from obtaining justice ? You must allow that the accusation is either true or false. But, supposing it true that the King did amiss in prorogating the Parliament, the Common Council of London neither by charter nor prescription had any right to control him. If the matter were not true (as it is not), the Petition is a mere calumny. But if you could justify the presenting of the Petition how can you justify the printing of it, whereby the Mayor, Aldermen, and citizens of London do let all the nation know that the King, by the prorogation of Parliament, hath given the public justice of the nation an interruption ? Pray, by what law, or custom, or charter, is this privilege of censure exercised ? You stand forth as 'chartered libertines.' As for the *impeccability* of the corporation, and your doctrine that nothing which it does can affect its being, strange would be the result if that which the corporation does is not the act of the corporation, and if, the act being unlawful and wicked, the corporation shall be dispunishable. I tell you I deliver no opinion now,—I only mention some points worthy of consideration. Let the case be argued again next term."

In the ensuing term the case was again argued by Sawyer, the Attorney General, for the Crown, and Pollexfen for the City,—when Lord Chief Justice Saunders said, "We shall take time to be advised of our opinion,

<sup>1</sup> 2 Shower, 264. ; Sir Thomas Raymond, 478.



but I cannot help now saying what a grievous thing it would be if a corporation cannot be forfeited or dissolved for any crime whatsoever. Then it is plain that you oust the King of his *Quo Warranto*, and that, as many corporations as there are, so many independent commonwealths are established in England. We shall look into the precedents, and give judgment text term."

When next term arrived, the Lord Chief Justice Saunders was on his death-bed. His course of life was so different from what it had been, and his diet and exercise so changed, that the con- [JUNE 12.] stitution of his body could not sustain it, and he fell into an apoplexy and palsy, from which he never recovered.<sup>1</sup> But, before his illness, he had secured the votes of his brethren.

The judgment of the Court was pronounced by Mr. Justice Jones, the senior Puisne Judge, who said,—

"Several times have we met and had conference about this matter and we have waited on my Lord Saunders during his sickness often; and, upon deliberation, we are unanimously of opinion that a corporation aggregate, such as the City of London, may be forfeited and seized into the King's hands, on a breach of the trust reposed in it for the good government of the King's subjects;—that to assume the power of making bye-laws to levy money, is a just cause of forfeiture;—and that the Petition in the pleadings mentioned is so scandalous to the King and his government, that it is a just cause of forfeiture. Therefore, this Court doth award that the liberties and franchises of the City of London be seized into the King's hand."

This judgment was considered a prodigious triumph, but it led directly to the misgovernment which in little more than five years brought about the Revolution and the establishment of a new dynasty. To guard against similar attempts in all time to come, the charters, liberties, and customs of the City of London were then confirmed, and for ever established, by act of parliament.<sup>2</sup>

Saunders was Chief Justice so short a time, and this was so completely occupied with the great *QUO WARRANTO* Case, that I have little more to say of him as a Judge. We are told that "while he sat in the Court of King's Bench he gave the rule to the general satisfaction of the lawyers."<sup>3</sup>

We have the account of only one trial before him at *nisi prius*,—that of *Pilkington, Lord Grey de Werke, and others*, for a riot. Before the City of London was taken by a regular siege, an attempt had been made upon it by a *coup de main*. The scheme was to prevent the regular election of sheriffs, and to force upon the City the two Court candidates, who had only a small minority of electors in their favor. In spite of violence used on their behalf, the poll was going in favor of the liberal candidates, when the Lord Mayor, who had been gained over by the Government, pretended to adjourn the election to a future day. The existing sheriffs, who were the proper officers to preside, continued the poll, and declared the liberal candidates duly elected. Nevertheless, the Court candidates

<sup>1</sup> Life of Guilford, ii. 129.

<sup>2</sup> Shower, 275.; 8 St. Tr. 1039-1258.

<sup>3</sup> Life of Guilford, ii. 129.



were sworn in as sheriffs, and those who had insisted on continuing the election after the pretended adjournment by the Lord Mayor were prosecuted for a riot. They pleaded *not guilty*, and, a jury to try them having been summoned by the new sheriffs, the trial came on at Guildhall before Lord Chief Justice Saunders. He was then much enfeebled in health, and the excitement produced by it was supposed to have been the cause of the fatal malady by which he was struck a few days after.

The jury being called, the counsel for the defendants put in *a challenge to the array*, on the ground that the supposed sheriffs, by whom the jury had been returned, were not the lawful sheriffs of the City of London, and had an interest in the question :—

*L. C. J. Saunders* : “Gentlemen, I am sorry you should have so bad an opinion of me, and think me so little of a lawyer, as not to know that this is but trifling, and has nothing in it. Pray, gentlemen, do not put these things upon me.” *Mr. Thompson* : “I desire it may be read, my Lord.” *L. C. J. Saunders* : “You would not have done this before another judge ; you would not have done it if Sir Matthew Hale had been here. There is no law in it.” *Mr. Thompson* : “We desire it may be read.” *L. C. J. Saunders* : “This is only to tickle the people.” The challenge, however, was read. *Jeffreys* : “Here is a tale of a tub indeed !” *L. C. J. Saunders* : “Aye, it is nothing else, and I wonder that lawyers should put such a thing upon me.” *Mr. Thompson* : “My Lord, we desire this challenge should be allowed.” *L. C. J. Saunders* : “No, indeed, wont I. There is no color for it.” *Mr. Thompson* : “My Lord, is the fact true or false ? If it be insufficient in point of law, let them demur.” *Jeffreys* : “‘Robin Hood on Greendale stood’ !!! I pray for the King that it may be overruled.” *Mr. Thompson* : “My Lord, I say where a sheriff is interested in point of title, he is no person in law to return a jury. The very title to the office is here in question.” *L. C. J. Saunders* : “Mr. Thompson, methinks you have found out an invention, that the King should never have power to try it even so long as the world stands. Who would you have the process go to ?” *Mr. Thompson* : “To the coroner.” *L. C. J. Saunders* : “My speech is but bad ; let me know what objection is made, and if I can but retain it in my memory, I don’t question but to give you satisfaction. The sheriffs who returned the jury are sheriffs *de facto*, and their title cannot thus be inquired into. Wherever the defendant thinks it may go hard with him, are we to have a trial whether the sheriffs be sheriffs or no ? What you are doing may be done in every cause that may be trying.” *Mr. Thompson* : “My Lord, we pray a bill of exceptions.” *Jeffreys* : “This discourse is only for discourse sake. Swear the jury.” *L. C. J. Saunders* : “Aye, swear the jury.”

So far, he was right in point of law ; but, when the trial proceeded upon the merits, to suit the purposes of the Government and to obtain a conviction he laid down doctrines which he must well have known to be indefensible respecting the power of the Lord Mayor to interrupt the poll by an adjournment, and the supposed offence of the electors in still continuing the election, they believing that they were exercising a lawful franchise. Finally, in summing up to the jury, he observed :—

"But they pretend that the sheriffs were the men, and that the Lord Mayor was nobody; that shows that it was somewhat of the Commonwealth seed that was like to grow up among the good corn." [Here the report says, *the people hummed and interrupted my Lord*. He thus continued.] "Pray, gentlemen, that is a very indecent thing; you put an indignity upon the King. Pray, gentlemen, forbear; such demeanor does not become a court of justice. When things were topsy-turvy I can't tell what was done, and I would be loth to have it raked up now. These defendants tell you that they believed they were acting according to law, but ignorance of the law is now no excuse, and you will consider whether they did not in a tumultuary way make a riot to set up a magistracy by the power of the people? Gentlemen, it hath been a long trial, and it may be I have not taken it well; my memory is bad, and I am but weak: I don't question but your memories are better than mine. Consider your verdict, and find as many guilty as you think fit."

The jury having been carefully packed, the defendants were all found guilty, and they were heavily fined; but, after the Revolution, this judgment was reversed by the legislature.<sup>1</sup>

During Lord Chief Justice Saunders' last illness the Ryehouse Plot was discovered, and it was a heavy disappointment to the Government that no further aid could be expected from him in the measures still contemplated for cutting off the Whig leaders and depressing the Whig party. His hopeless condition being ascertained, he was deserted and neglected by all his Whitehall patrons, who had lately been so attentive to him, and he received kindness only from humble dependents and some young lawyers, who, notwithstanding all his faults, had been attached to him from his singular good humor.

A few minutes after ten o'clock in the forenoon of Tuesday, the 19th of June, 1683, he expired in a house at Parson's Green, to which he had unwillingly transferred himself from Butcher Row when promoted to be Chief Justice.<sup>2</sup> His exact age was not known, but he was not supposed to be much turned of fifty, although a stranger who saw him for the first time would have taken him to be considerably more advanced in life. Of his appearance, his manners, and his habits, we have, from one who knew him intimately, the following graphic account, which it would be a sin to abridge or to alter:—

"As to his person, he was very corpulent and beastly; a mere lump of morbid flesh. He used to say '*by his troggs* (such an humorous way of talking he effected) *none could say he wanted issue of his body, for he had nine in his back.*' He was a fetid mass that offended his neighbors at the bar in the sharpest degree. Those whose ill-fortune it was to stand near him were confessors, and in summer-time almost martyrs. This hateful decay of his carcass came upon him by continual sottishness; for, to say nothing of brandy, he was seldom without a pot of ale at his nose, or near him. That exercise was all he used; the rest of his life was sitting at his desk or piping at home; and that *home* was a tailor's house, in Butcher Row, called his lodging, and the man's wife was his

<sup>1</sup> 9 St. Tr. 187-298.

<sup>2</sup> 3 Mod. 25.

nurse or worse : but by virtue of his money, of which he made little account, though he got a great deal, he soon became master of the family ; and, being no changeling, he never removed, but was true to his friends and they to him to the last hour of his life. With all this, he had a goodness of nature and disposition in so great a degree that he may be deservedly styled a *philanthrope*. He was a very *Silenus* to the boys, as in this place I may term the students of the law, to make them merry when ever they had a mind to it. He had nothing of rigid or austere in him. If any near him at the bar grumbled at his stench, he ever converted the complaint into content and laughing with the abundance of his wit. As to his ordinary dealing, he was as honest as the driven snow was white ; and why not, having no regard for money or desire to be rich ? And for good nature and condescension, there was not his fellow. I have seen him for hours and half hours together before the court sat, stand at the bar, with an audience of students over against him, putting of cases, and debating so as suited their capacities and encouraged their industry. And so in the Temple, he seldom moved without a parcel of youths hanging about him, and he merry and jesting with them. Once, after he was in the King's business, he dined with the Lord Keeper, and there he showed another qualification he had acquired, and that was to play jigs upon an harpsichord, having taught himself with the opportunity of an old virginal of his landlandy's ; but in such a manner, not for defect but figure, 'as to see him was a jest.'<sup>1</sup>

I have not to give a relation of peers, baronets, or knights, descended from this Chief Justice, as he was never married, but he has nevertheless contributed to the "Grandeur of the Law" by his REPORTS, which are so entertaining as well as instructive that they have instilled into many a taste for juridical study, notwithstanding its imagined dryness, proving our science to be—

"Not harsh and crabbed, as dull fools suppose,  
But—a perpetual feast of nectar'd sweets,  
Where no crude surfeit reigns."<sup>2</sup>

Notwithstanding his carelessness about money, he left considerable property behind him. This he disposed of by a will, dated 23d of August, 1676,—republished 2d of Sept. 1681, and proved by sentence of the Prerogative Court on the 14th of July, 1683,—whereby he gives to Mary Gutheridge his lease of the Bishop's land, "which will come to her by special occupancy as being my heir at law ;" and he bequeaths legacies to his father and mother Gregory, his sister Frances Hall, his old aunt Saunders, and his cousin Sarah Hoare. Among other charitable bequests, he leaves to the poor of the parish of Barnwood, in the county of Gloucester, where he drew his first breath, the sum of 20*l.* to be distributed at the discretion of his father Gregory if he shall be living.

<sup>1</sup> Life of Guilford, ii. 126–129. ; and see Granger, iii. 367.

<sup>2</sup> The editions of these Reports by the late Serjeant Williams, and by the present most learned Judges, Mr. Justice Patteson and Mr. Justice Vaughan Williams, illustrated by admirable notes, may be said to embody the whole common law of England, scattered about, I must confess, rather immethodically.



His friends Nathaniel Earle and Jane his wife (the master and mistress of the house in which he lodged in Butcher Row) he appoints his executor and executrix and residuary legatees, "as some recompense for their care of him, and attendance upon him, for many years."<sup>1</sup>

His armorial bearings, which must have been granted to him when he was knighted, have been discovered by the diligence of that skilful antiquary, Mr. Pulman, Deputy Usher of the Black Rod; and, with those of the other Chief Justices, from the earliest times, now ornament the splendid library of the House of Lords in the new palace at Westminster.

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## CHAPTER XXII.

### CHIEF JUSTICES FROM THE DEATH OF SIR EDMUND SAUNDERS TILL THE REVOLUTION.

ON the sudden death of Saunders, there was much perplexity as to the appointment of his successor. His want of political principle and his immoralities had been to a certain degree counterbalanced by his profound knowledge of the law, his mildness of disposition, and his popular manners. The candidate eagerly pressing forward his claims, and supported by the most unscrupulous courtiers, was notoriously destitute of public or private virtue,—knew nothing of his profession beyond what he had picked up in Old Bailey practice,—was brutally offensive in his deportment to all who were opposed to him; and, acting as a subordinate judge, had, on various occasions, set at defiance the rules of decency and the dictates of humanity. Even Charles II. himself—who, in making appointments, did not stand upon trifles as far as character was concerned, and who had been pleased to see sitting in his council Shaftesbury, who boasted of being, next to himself, the most profligate man in England—shuddered at the approach of Jeffreys, saying, "That man has no learning, no sense, no manners, and more impudence than ten carted street-walkers."

Meanwhile, the trials arising out of the Rye-house Plot were coming on, and vengeance was to be taken on the Whigs for their vigorous and often successful opposition to the measures of the Court since the Sovereign of England had degraded himself into a viceroy of France. Good hopes had been entertained of Pemberton for presiding Judge, as he had received a severe warning against his occasional displays of independence by being removed from the King's Bench to the Common Pleas, with hints of the further punishment that might await him if he should not be more zealous in the public service. But he had nearly allowed Lord Russell to escape; and it was foreseen that, notwithstanding his timidity, he must necessarily direct the acquittal of Sydney, against whom there

<sup>1</sup> Will in C. P. C. Reg. 147. Drax.

was no case, without making an old MS. essay on the speculative principles of government, found among his papers, an overt act of high treason. "Work was to be done which could be trusted to no man who revered law, or was sensible of shame."<sup>1</sup> Accordingly there was placed in the supreme seat of justice, knowingly and designedly, one of the most infamous wretches who ever wore the human form, and whose atrocities, when elevated to power, were not more revolting than might have been expected from his established character and past conduct. "All people were apprehensive of very black designs when they saw Jeffreys made Lord Chief Justice, who was scandalously vicious, and was drunk every day; besides a drunkenness of fury in his temper that looked like enthusiasm."<sup>2</sup>

It would now be my duty to trace the extraordinary career of this monster from his birth in an obscure Welsh village, to his death in the Tower of London, if I had not already done so in my "LIVES OF THE CHANCELLORS." Subsequent researches suggest little addition to the facts I have already narrated concerning him and no mitigation of the sentence of infamy which I have pronounced upon him. As a further proof of his contempt of decency on the bench, I may mention that on the trial of the learned and pious divine Richard Baxter, after exclaiming, in his own natural violent tone, "This is an old rogue, a schismatical knave, a hypocritical villain; he hates the liturgy; he would have nothing but long-winded cant without book," the Lord Chief Justice suddenly turned up his eyes, clasped his hands, and began to sing through his nose, in imitation of what he supposed to be Baxter's style of praying, "LORD, WE ARE THY PEOPLE! THY PECULIAR PEOPLE!! THY DEAR PEOPLE!!!"<sup>3</sup>

I ought to have dwelt more upon his venality during the "Bloody Assizes," for of the 841 prisoners whose lives were spared, and who were transported as slaves to the colonies, many were sold on his own account, and, long as was the voyage, and sickly, he calculated that from the state of the slave market, after all charges were paid, they would average 15*l.* a head.<sup>4</sup> But the proceeds of all these sales did not fetch him so much as a single pardon. Most of the men accused of joining Monmouth were from the lower ranks of life, and, except in the sale of their persons, they could be turned to little profit, for they could muster only a very small bribe to be let off, and, if convicted and executed, their forfeited property was seldom more than a flock of geese or a flitch of bacon. The Chief Justice was therefore delighted to find that he had got in his toils Edward Prideaux, who had inherited broad lands from his father, an eminent lawyer in the time of the Commonwealth, and, who, without having been in arms, was suspected of favoring the rebellion. Although no witness could be got to swear against this gentleman, he wisely agreed to pay 15,000*l.* for his liberation. With this

<sup>1</sup> Macaulay, i. 452.

<sup>2</sup> Burnet, O. T., ii. 231.

<sup>3</sup> 10 St. Tr. 1315.; Life of Baxter, ch. xiv.

<sup>4</sup> Original letters in the State Paper Office: Sutherland to Jeffreys, Sept. 14, 1685; Jeffreys to the King, Sept. 19, 1685.



ransom Jeffreys became the purchaser of a large estate, the name of which the people changed to *Acelanda*, as being purchased with the price of innocent blood.<sup>1</sup>

I ought, likewise, to have stated, as another instance of his unexampled cruelty, that, after his return from the west, and receiving the great seal, on the very day on which Alderman Cornish was hanged and beheaded in Cheapside, he caused Elizabeth Gaunt to be burned alive at Tyburn, for having piteously given shelter to a fugitive who betrayed her. She was a sister of Charity: her life had been passed in relieving the unhappy of all religious denominations, and she was well known as a constant visitor of the gaols in the hope of enlightening and reforming their unhappy inmates. She met her fate with great composure; leaving behind her a paper in which, after describing what she had suffered from the ferocity of her gaoler, and others who had oppressed her, she complained of "the tyranny of him, the great one of all, to whose pleasure she and so many other victims had been sacrificed—declaring that in as far as they had injured herself she forgave them, but, in that they were implacable enemies of that good cause which would yet revive and flourish, she left them to the judgment of the King of Kings."<sup>2</sup>

To show that the memory of his cruelties remained in the country in which they were most conspicuously exhibited, so as to raise a desire to visit them on his descendants to the third generation,—I should likewise wish to add the anecdote that when he had been many years dead, and his name and title were extinct, the Countess of Pomfret, travelling into the west of England, having been discovered to be his granddaughter, was insulted by the populace, and could not venture to proceed to the scene of the "Bloody Assizes."<sup>3</sup>

It has been objected to me, that I have done injustice to Jeffreys, by representing that he readily acquiesced in all James's measures for overturning the religion and liberties of his country, whereas he condemned many of them. This charge against me is founded merely on proofs of the hypocrisy and duplicity of the great delinquent. He did pretend to some, who were in opposition to the Court, that his Protestant conscience was shocked by the scheme of bringing in Popery; but at the same time he put the broad seal to the Declaration of Indulgence, and, sitting in the illegal Court of High Commission, he abetted all the proceedings for converting Magdalene College, Oxford, into a Popish seminary. "The two French agents, who were then resident in London, had very judiciously divided the English Court between them. Bonrepaux was constantly with Rochester; and Barillon lived with Sunderland. Lewis was informed in the same week by Bonrepaux that the Chancellor was entirely with the Treasurer, and by Barillon that the Chancellor was in league with the Secretary."<sup>4</sup> Again: Jeffreys gave out to one party

<sup>1</sup> Commons' Journals, Oct. 9., Nov. 10., Dec. 26. 1690; Oldmixon, 706.

<sup>2</sup> 11 St. Tr. 381–455.; Burnet, O. T., i. 649.

<sup>3</sup> Granger, "Jeffreys."

<sup>4</sup> Macaulay, ii. 67., cites Reresby's Memoirs; Luttrell's Diary. Feb. 2. 1685; Barillon, Feb.  $\frac{4}{14}$ ; Bonrepaux,  $\frac{\text{Jan. 25.}}{\text{Feb. 4.}}$ .

that he highly disapproved of the proceedings against the Seven Bishops, while it is quite certain that he declared in council, "The Government would be disgraced if such transgressors were suffered to escape, as was proposed by Sunderland, with a mere reprimand,"<sup>1</sup> and that he strenuously recommended the criminal information on which they were brought to trial,—“counting with certainty on a conviction which would induce the right reverend defendants to save themselves from ruinous fines and long imprisonments by serving, both in and out of parliament, the designs of the Sovereign.”<sup>2</sup>

Jeffreys held the office of Chief Justice of the King's Bench rather more than two years, having been reappointed to it on the death of Charles II. by James II., who had been his early patron, and to whom he was more and more endeared as his inhuman disposition was more and more developed. Being created a peer, and introduced into the Cabinet, he soon undermined, by his superior vigor and servility, the influence of the Lord Keeper Guilford, and, having broken the heart of [SEPT. 29, 1685.] that mean-spirited but not unamiable man, his “campaign in the west” was rewarded with the great seal.

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A month was occupied in considering who should succeed him as Chief of the King's Bench. Although Monmouth had been executed, and the blood of rebels had flowed till the feelings of all classes were outraged, and even the vengeance of James himself was satiated, the due filling up of the offices was considered a matter of the last importance to the Government. The plan to change the religion of the country was now formed, and this was to be carried into effect by judicial decision rather than by military violence. The King expected to accomplish his object by extending what was called the “dispensing power” to all the laws of the realm, although it had been hitherto confined to common penal statutes, which were enforced by a pecuniary mulct. Where was a man to be found who, as head of the Common Law Judges, would himself declare, and would induce a majority of his brethren to join with him in declaring, that the King had the power contended for,—or, in other words, that, like the despotic princes on the Continent, he was above the law? That man was SIR EDWARD HERBERT! Of his steadiness on this question no doubt could be entertained—but when his appointment was recommended, two objections presented themselves: 1st. That he was quite ignorant of his profession; 2dly. That he was conscientious in his opinions, and of strictly honorable principles in private life. The former was easily surmounted from his known zeal in support of the prerogative; and though it was anticipated that some inconvenience might arise from his vicious habit of abstaining from what he believed

<sup>1</sup> Journal of Second Lord Clarendon, June 24. 1668.; 12 St. Tr. 195.

<sup>2</sup> This has been placed beyond all doubt by the original despatches of the French and Dutch Ministers examined by Mr. Macaulay. Barillon, <sup>May 24.</sup> June 3. 1688; Citters, July  $\frac{1}{11}$ ; Adda, <sup>May 30.</sup> June 9. June,  $\frac{1}{11}$ .

to be wrong, hopes were entertained that, from his ultra-Tory notions, he would not boggle at any thing which might be required of him.— Upon the whole, the opinion at Whitehall was, that, for the King's service, a safer choice could not be made. Accordingly, on the 11th of October, 1685, Sir Edward Herbert took his seat as Chief Justice of the Court of King's Bench, and I am called upon to give a sketch of his life.

He was the youngest son of that Sir Edward Herbert whom I have commemorated as holding the great seal of England while in exile with Charles II.<sup>1</sup> During the Commonwealth, the children of the titular Lord Chancellor remained in England with their mother; and, after his death at Paris, in 1657, they were reduced to great indigence. Edward was admitted on the foundation of Winchester School, and was elected from thence a probationer fellow to New College, Oxford. He was idle and volatile, but much liked for his warmth of heart and gentlemanly demeanor. He inherited a strong abhorrence of Roundheads, and he considered the Whigs as the same republican party under another name. From his earliest recollection to his latest breath, he looked upon the five members of the House of Commons whom his father, when Attorney General, had impeached of high treason by order of Charles I., as not less guilty than the regicides who had sat in the high court of justice; and he thought it of essential importance for the public good that the Crown should be armed with sufficient power to put down and to punish all who were inclined to sedition or schism.

With this bias on his mind, he began the study of the law in the Middle Temple, and, setting down all the arbitrary decisions of judges for sound law, and all the violent acts of the executive government for good constitutional precedents, while he imputed everything that he met with on the other side to faction and popular delusion, he brought himself to the belief that the kings of England were absolute at all points, with a very few exceptions; and that, although they might find it convenient to consult a parliament, they might rule, if they chose, by their own authority. But his knowledge of law was superficial, and was confined almost exclusively to cases connected with politics.

Under Charles II. there was a disposition to do as much as possible for the Herberts, on account of the sufferings of their father in the royal cause; and the two elder sons were pushed on in the army and navy; but there was much difficulty in making any provision for Edward, who was called a lawyer, but was wholly unacquainted with the first principles of pleading and conveyancing; and, never having been intrusted with a brief by a private client, could not, without serious risk, be allowed to appear in the King's business in Westminster Hall. It was thought, however, that any thing would do for Attorney General in Ireland, where they have never been very exact in legal formalities. Accordingly he was sent over there, and for several years was supposed to execute the duties of the office decently well under the Duke of Ormond, the popular Lord Lieutenant. A residence in Dublin was then

<sup>1</sup> Lives of the Chancellors, vol. iii. ch. lxxiii.



considered distant banishment. The transit from thence to London was often attended with great peril and delay, and intelligence was interchanged between the two islands very irregularly. He therefore longed for a return to *civilized life*, for which he had a keen relish; and, having laid by a little money, he resigned the Irish Attorney Generalship, and came to push his fortune at Whitehall. Still pretending to practise at the bar, he received a silk gown. The English attorneys were as shy of employing him as when he wore bombazin; but his connections, his [A. D. 1683.] principles, and his agreeable manners nevertheless obtained him favor at Court. He succeeded Sir George Jeffreys as Chief Justice of Chester; and soon after, on the promotion [A. D. 1685.] of Sir John Churchill to be Master of the Rolls, he was appointed Attorney General to the Duke of York, and was knighted. Now he was often consulted on constitutional questions by his royal master, the heir presumptive; who, much pleased with the answers returned, set him down as fit to fill the highest offices in the law. He was particularly firm respecting the dispensing power;<sup>1</sup> and— notwithstanding the doubts upon the subject indicated by high prerogative lawyers, such as Lord Clarendon, Lord Keeper Bridgman, Lord Chancellor Nottingham, and Lord Keeper Guilford—maintained that the royal assent was given to bills passed by the two Houses of Parliament on the implied condition that the King might suspend the operation of the law when necessary for the public safety; and that, this power being essentially inherent in the Crown, no statute could take it away, or abridge it. He was of the school of political speculators which produced Filmer, Lestrange, and Brady,—maintaining that the Crown is the only legitimate source of authority; that the House of Commons, having been created by the Crown, is subordinate to the Crown; and that, as it may still be prorogued or dissolved, as well as summoned, by the Crown, the Crown is entitled to exercise a paramount control over all its acts. He sometimes made a distinction between the King's power over common law and statute law; but, although he was known not to be without some scruples which might be troublesome, his friends said they would all melt away before his burning loyalty.

He is not once mentioned in the Reports: he had never led any important cause, or argued any important point of law, in an English court; and, although he regularly attended the King's Bench in term time, it was for society rather than for business. He was considered a sort of *dilettante lawyer*, and probably he himself thought not of a higher office than that of Chief Justice of Chester, which only occupied a few days of his time twice a year. It is quite certain that he never solicited,

<sup>1</sup> Clarke, in his life of James II., mainly rests his justification of that monarch's conduct on the authority of Herbert. Speaking of the Test Act, he says, "One great inducement not to boggle at dispensing with it, was his calling to mind that in the late King's time, after his return from Scotland, and that he began to be much employed in his business, Mr. Herbert, then Ch. Justice of Chester, told him, that if he desired to re-enter into his former employment, he could make it appear that it was in the King's power to dispense with the Test Act."



or in any way intrigued for, the office of Chief Justice of the King's Bench, so that he was greatly astonished when it was offered to him. He did not hesitate to accept it when he was told that the King required his services.

There is no record of the ceremony of his installation. The merits and sufferings of his father must have constituted the staple of the Chancellor's address to him; and his answer must have been confined to the expression of gratitude for the unexpected dignity and sincere good intentions in the fulfilment of his new duties.<sup>1</sup>

The profession and the public, without nicely scanning his legal qualifications, were pleased to see mildness, equanimity, and sobriety again adorning the seat of justice, lately disgraced by fierceness, [Oct.] violence, and drunkenness. Even those who most highly disapproved of his politics were disposed to speak kindly of him. Says Burnet, "He was a well bred and a virtuous man, generous and good natured, although an indifferent lawyer. He unhappily got into a set of very high notions with relation to the King's prerogative. His gravity and virtues gave him great advantages; chiefly his succeeding such a monster."<sup>2</sup>

He was sworn a member of the Privy Council, but he was never admitted into the Cabinet.

In the private cases which came before him he was entirely guided by the opinion of the Puisne Judges; and, by discretion, and speaking only as he was prompted, he made a very respectable appearance, and the vulgar called him a great Judge.

The first political case in which an opinion was required from him was the prosecution of Lord Delamere for high treason; and, as the prerogative of the Crown was not concerned in the ques- [A. D. 1686.] tion submitted to him, he displayed on this occasion moderation and diffidence. The noble lord, the object of the prosecution, had, when a member of the House of Commons, given mortal offence to Jeffreys, who now sat as his judge, and was eager to convict him. The trial took place before the Lord High Steward and a select number of Peers,—the Judges attending as assessors. The whole day being spent in giving evidence for the Crown, the noble prisoner applied for an adjournment till next morning, before opening his defence. Jeffreys determined, if possible, to sentence him to be hanged, beheaded, and quartered before going to sleep; but, desirous to keep up appearances, and to throw upon others, the odium of the precipitation which he desired, said he would willingly comply with the request if the law would allow of an adjournment, which much doubting, he would put the question to the Judges. His real inclination being well known to them, he expected (what *he* would have pronounced under the like circumstances) a flat negative upon the power of adjournment. But Lord Chief Justice Herbert said,—

"The Judges presume to acquaint your Grace that this is a matter wholly new to them, and that they know not, upon recollection of all

<sup>1</sup> See 2 Shower, 434.; 3 Modern Reports, 71.

<sup>2</sup> Burnet, O. T., ii. 362, 363.

that they can remember to have read, either that this matter was done or questioned. Had it received a determination, and been reported in our books, our duty would have been to contribute all our reading and experience for the satisfaction of this great Court; but, being a new question, and the precedent being to make a rule respecting the powers and privileges of the Peers for the time to come, we cannot venture to resolve it. In the case of the trial of a peer in parliament, there have been adjournments from day to day; but whether it makes a difference that here the Lord High Steward sits judge, and the Peers-triers are in the nature of a jury, we submit to your Grace's consideration. In an inferior court the jury, once sworn, are not allowed to separate, from the fear of corruption; but that reason seems to fail here, the prisoner being to be tried by his peers, that are men of unsuspected integrity, and give their verdict upon their honor."

The Peers, upon this, were for adjourning, but Jeffreys in a rage said "that the court was his, and that, he sitting as sole judge in it, they had no right to regulate its proceedings." He then gave a decided judgment that he could not and would not adjourn, and he ordered the prisoner to go on with his defence, saying that "by law the trial must finish before they separated." Nevertheless he was disappointed of his prey, for Lord Delamere made an admirable defence, and the Peers, sympathizing with him on account of the harsh treatment he had received, unanimously acquitted him.<sup>1</sup>

Soon after came on the grand question with a view to which Herbert had been appointed Chief Justice, and he fully answered the expectation which had been formed of him.

Judicially to establish the dispensing power, a sham action was brought by the coachman of Sir Edward Hales against Sir Edward Hales, his master. The defendant, although a Roman Catholic, had been appointed Lieutenant of the Tower of London; and the declaration alleged that, contrary to the provisions of the Test Act, he had exercised the duties of the office without having made the declaration against transubstantiation or taken the oath of supremacy. By way of justification, he pleaded "that after the grant of the office, the King, by letters-patent under the great seal, *notwithstanding* any statutes or law in that behalf, *dispensed* with his making the declaration against transubstantiation and with his taking the oath of supremacy, as well as with his receiving the sacrament according to the rites of the Church of England." The plaintiff demurred admitting the dispensation and praying judgment upon its validity. Thus the existence of the dispensing power was regularly raised on the record, and was to be solemnly decided.

The Chief Justice, although he had no doubts himself, found it a more difficult task than he had anticipated to prevail upon the other Judges to agree with him. According to the usual custom of those days, before the case was argued in court he assembled all the Judges to deliver their opinion upon it. To his unspeakable surprise, there were four Judges who declared that the King had no power to dispense with a statute

<sup>1</sup> 11 St. Tr. 510-599.

which Parliament had enacted for the preservation of the established religion of the country. Their opposition was the less suspected because they were all four steady Tories, although not of such extravagantly high prerogative principles as Herbert himself; and they had all four sat on the trials of Alderman Cornish and Elizabeth Gaunt, where there had been an extraordinary compliance with the wishes of the Government. Their contumacy being reported to the King, he summoned them into his presence, and conversed with them at Whitehall, but could make no impression upon any of them either by soft or angry language. He thought he might safely calculate upon their supporting him in any violation of the constitution; but he forgot that where religion mixes in a controversy it is impossible to foretell with certainty what will be the conduct of any individual or of any body of men. "Jones, the Chief Justice of the Common Pleas, a man who had never before shrunk from any drudgery, however cruel or servile, now held, in the royal closet, language which might have become the lips of the purest magistrates in our history."<sup>1</sup> Being told that he must either give up his opinion or his place, "For my place," he answered, "I care little; I am old and worn out in the service of the Crown; but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give." *King*: "I am determined to have twelve lawyers for judges who will be all of my mind as to the matter." *C. J. Jones*: "Your Majesty may find twelve *judges* of your mind, but hardly twelve *lawyers*." James always piqued himself on being a man of his word, and Jones had his *quietus* next morning. With him were dismissed Montagu, Chief Baron of the Exchequer, and two puisnies, Neville and Charlton. Four new Judges were appointed, who had taken the royal test by declaring their belief in the unlimited, illimitable, and eternal nature of the dispensing power. One of them was the brother of the author of "Paradise Lost," and of the "Defence of the people of England for putting Charles I. to death." Sir Christopher Milton, recommended by Herbert, was in all respects a striking contrast to John, as he was not only a favorer of Popery, and a friend to arbitrary power, but the dullest of mankind.<sup>2</sup>

Some delay still arose in carrying the case to a hearing, for Sawyer, the Attorney General, who had brought Russell and Sydney to the block, refused to argue this sham demurrer in favor of an attempt "to annul the whole statute law from the accession of Elizabeth." Heneage Finch, the Solicitor General, following his example, was turned out of office; and time was required for the mean-spirited Powys, who succeeded him, to prepare for his dirty work.

At last the farce was acted, Northey taking the part of counsel for the plaintiff, and pretending to argue that the dispensation was [JUNE 16.] no bar to the action; while the new Solicitor General urged that the King's prerogative was and is as much the law of England as

<sup>1</sup> Macaulay, ii. 82.

<sup>2</sup> Although not reconciled to Rome, he came so near her, that he would not communicate with the Church of England. Echard, iii. 797.; Kennet, iii. 451.



any statute, and that, although the King cannot prejudice private right, the power of dispensing with all public statutes was inseparably annexed to his crown.

At the close of the argument, Herbert, C. J., said, with much gravity, that "the Court would take time to consider," and on a subsequent day he delivered the following judgment :—

"This is a case of great consequence, but of as little difficulty as ever any case was that raised so great an expectation. If the King cannot dispense with this statute, he cannot dispense with any penal law whatsoever. There is no law but may be dispensed with by the supreme lawgiver. The laws of God may be dispensed with by God himself, as appears by God's command to Abraham to offer up his son Isaac. So, likewise, the law of man may be dispensed with by the legislator. A law may be either too wide or too narrow ; the wisest lawgiver cannot foresee all the consequences of a law, and therefore there must be a power somewhere able to dispense with it. We have consulted our brethren who have met and conferred on the subject at Serjeants' Inn, and, with one exception, they all agree with us in the opinion that the kings of England are absolute sovereigns ; that the laws of England are the King's laws ; that the King has power to dispense with any of his laws as he sees necessity for it ; that the King is the sole judge of that necessity ; and that this is not a trust invested in or granted to the King by the people, but the ancient sovereign power and prerogative of the kings of England, which never yet was taken from them nor can be by parliament or any human means. My brother Street, indeed, is of opinion that the King, notwithstanding his general dispensing power, cannot validly grant the dispensation pleaded by the defendant ; but that is the opinion of one single judge against the opinion of eleven. We therefore give judgment for the defendant."<sup>1</sup>

Without the privity of Herbert, who was too honorable a man to have countenanced such trickery, Street, who was known to be the most servile Judge on the bench, who would have been instantly turned adrift if he had been sincerely opposed to the dispensing power, but who cared as little for religion as for law, had been ordered to dissent, for the purpose of leading the public to believe that the Judges, left to the freedom of their own will, had decided for the Crown by a vast majority, without being entirely unanimous. So infamous a wretch was Street, that, at the Revolution, on the strength of this collusive dissent, he attempted to make Court to King William ; but, his real baseness being exposed, he met with a mortifying rebuff.<sup>2</sup>

<sup>1</sup> 11 St. Tr. 1165–1198.

<sup>2</sup> "Dec. 27, 1688. Tuesday, in the morning, I went to St. James' with Judge Street to present him to the Prince ; but I was told the Prince was busy, and I could not get admittance. While I was in the outward room, my Lord Coote came to me and told me he was sorry to see me patronize Street. He did not join in the judgment for the dispensing power ; but he is a very ill man. I have given the Prince a true character of him ; and therefore I desire your Lordship will not concern yourself any more for him."—*Diary of Henry, Earl of Clarendon.*

However, when Judge Street died, a splendid marble monument was erected



Upon this judgment Sir Robert Atkyns, then an ousted Judge (afterwards made Chief Baron of the Exchequer,) having published a very severe commentary, Chief Justice Herbert published a pamphlet in his own vindication,—in which he produced what he called his authorities, and, in answer to the personal reflections upon himself, observed,—

“I can truly say that I never heard of this action till it was actually brought. If it be a feigned action, the law is as well settled in a feigned action as in a true. There are feigned actions directed out of Chancery every day, and why may not the King direct such an action to be brought to satisfy himself whether he hath such a power? If there were indirect means used to obtain opinions, I stand upon my innocence, and challenge all the world to lay anything of that kind to my charge. My part was only to give my own opinion; and if I have drawn weak conclusions from what I find in our books, how can I be charged as a criminal? But I never gave a judgment with so many authorities to warrant it as in Sir Edward Hale’s case. If it was to keep my judge’s place, I then became the worst man in the world, only to keep that which most men know my friends found great difficulty in persuading me to accept.”<sup>1</sup>

King James was delighted beyond measure with the judgment, and with the defence of it; and, lauding himself for his sagacity in selecting such a Chief Justice, and taking personally to himself all the credit of the appointment, he passed such compliments and lavished such blandishments on Herbert, that Jeffreys was jealous, and reports were spread that the great seal would soon be transferred to a new Chancellor.<sup>2</sup>

By way of preliminary to the restoration of Popery as the religion of the state, there soon came out a “Declaration of Indulgence,” by which all sects of Christians were to be allowed to profess their faith without being subject to any disability, forfeiture, or penalty; and Herbert, sin-

to his memory, with an inscription which asserts that he was the only honest Judge in the reign of James II.; and thus concludes:—

“ . . . faithful found;  
Among the faithless, faithful only he;  
Among innumerable false, unmoved,  
Nor number, nor example, with him wrought,  
To swerve from truth, or change his constant mind,  
Though single.”—*Granger*.

<sup>1</sup> Whatever we may think of Herbert and his doctrine respecting the dispensing power, they have both had warm admirers. Clarke describes him, in his life of James II., as “a man of eminent learning and known integrity, sufficient to free him without further proof from the censure of partiality;” and says that “for his further vindication, he published his reasons with some of the many citations and examples he might have brought from the law books, which put the matter so far beyond dispute, that all the erudition of his adversaries or malice of his detractors could never furnish them with the least colour of a reply.”—2 *Clarke’s James II.*, p. 82. et seq.

<sup>2</sup> Lord Clarendon in a letter to the Earl of Rochester, dated Dublin Castle, June 3, 1686, says, “A story had reached Dublin, that my Lord Chancellor is in very little credit; that my Lord Ch. Justice Herbert had exposed him upon the bench by laying open his briberies and corruptions (as they are called) in the West, with which the King is extremely offended, insomuch that it is said he will not be long in his place.”—*Corresp. of Clar. and Roch.* p. 426.

cerely thinking this a lawful exercise of the royal prerogative, delighted the King more than ever, not only by pronouncing in favor of its legality, but by actually assisting in giving effect to it. "Since the Church party could not be brought to comply with the design of the Court, applications were now made to the Dissenters; and all on a sudden the churchmen were disgraced, and the dissenters were in high favor. Chief Justice Herbert went the Western Circuit after Jeffreys' bloody one. And now all was grace and favor to them. Their former sufferings were much reflected on and pitied. Every thing was offered that could alleviate their sufferings. Their teachers were now encouraged to set up their conventicles again, which had been discontinued, or held very secretly, for four or five years, and intimations were given that the King would not have them or their meetings to be disturbed."<sup>1</sup>

Burnet, from whom we have this account, adds, "Jeffreys was much sunk at Court, and Herbert was the most in favor. But now Jeffreys, to recommend himself, offered a bold and illegal advice."<sup>2</sup> This was to revive the Court of High Commission, whereby the clergy who should oppose the introduction of Popery might be deprived of their livings and punished for their contumacy. The author of this scheme was for a time dearer than ever to his master,<sup>3</sup>—but before long there were again thoughts of removing him, as the brutality of his conduct and his manners threw discredit on the Government; and Jeffreys himself, who was always alarmed by rivals, had once more serious dread of being supplanted by Herbert. But, all of a sudden, Herbert was disgraced, and Jeffreys was firmly established in power.

This change was produced by a point of law, on which, strange to say! the Chief Justice of the King's Bench, supposed to be slavishly obsequious, gave an opinion most highly distasteful to the owner of the dispensing power.

The plan was formed of ruling by a standing army. But without a parliament, how was this army to be kept in a proper state of discipline? In time of war, or during a rebellion, troops in the field were subject to martial law, and they might be punished, by sentence of a court martial, for mutiny or desertion. But the country was now in a state of peace and profound tranquillity; and the common law, which alone prevailed, knew no distinction between citizen and soldier; so that, if a life-guardsman deserted, he could only be sued for breach of contract, and if he struck his officer he was only liable to an indictment or an action of battery.—While the King's military force consisted of a few regiments of household troops, with high pay, desertion was not to be apprehended, and military offences were sufficiently punished by dismissal from the service. But James found it impossible to govern the numerous army which he had collected at Hounslow without the assistance of martial law,—and he contended that, without any act of parliament, he was at

<sup>1</sup> O. T. ii. 326, 327.

<sup>2</sup> Ib. 367. 370.

<sup>3</sup> "The Court being established, Jeffreys was made perpetual President—*sine qua non*—to guard against the influence of Herbert who was named a member of it."—*Ib.*

all times entitled, by virtue of his prerogative, to put martial law in force against military men, although it could only be put in force against civilians when war or rebellion was raging in the kingdom.

The question first arose at the Old Bailey, before Sir John Holt, then Recorder of London, and he decided against the Crown, as might have been expected; for, while avoiding keen partizanship in politics, he had been always Whiggishly inclined. James thought he was quite secure by appealing to the ultra-Tory, Lord Chief Justice Herbert. To the utter amazement of the King and the courtiers, this honorable, although shallow, magistrate declared that, without an act of parliament, all laws were equally applicable to all his Majesty's subjects, whether wearing red coats or gray. Being taunted with inconsistency in respect of his judgment in favor of the dispensing power, he took this distinction, "that a statute altering the common law might be suspended by the King, who is really the lawgiver, notwithstanding the form that he enacts, 'with the *assent* of the Lords Spiritual and Temporal, and Commons;' but that the common law cannot be altered by the King's sole authority, and that the King can do nothing [A. D. 1687.] contrary to the common law, as that must be considered coeval with the monarchy."

James, with the infatuated obstinacy which was now driving him to destruction, set this opinion at defiance; and, encouraged by Jeffreys, caused a soldier to be capitally prosecuted, at the Reading assizes, for deserting his colors. The judges presided there resorted to some obsolete inapplicable act of parliament, and were weak enough to lay down the law in the manner suggested to them by the Chancellor, so that a conviction was obtained. To give greater solemnity and *eclat* to the execution, the Attorney General moved the Court of King's Bench for an order that it might take place at Plymouth, in sight of the garrison from which the prisoner had run away. But Herbert peremptorily declared that the Court had no jurisdiction to make such an order, and prevailed on his brother Wythens to join with him in this opinion. Mr. Attorney *took nothing by his motion*, but the recreant Chief Justice and the recreant Puisne were both next morning dismissed from their offices, to make way for the most sordid wretches to be picked up in Westminster Hall—Sir Robert Wright [APRIL 16.] and Sir Richard Allibone, a professed papist.<sup>1</sup> Burnet, who has since been generally followed, represents that these removals took place on the eve of the trial of the Seven Bishops, and with a view to their conviction; but, in truth, the Second Declaration of Indulgence, out of which this celebrated prosecution arose, was not issued till a twelvemonth afterwards, and no human being had then imagined that the venerable fathers of the Anglican Church were to be

<sup>1</sup> *Rex v. William Beale*, 3 Mod. 124. We shall find that they unscrupulously made the order. "Even previous to these removes and changes, the Court was gratified, and the people shocked, with the execution of two deserters, one of whom was hanged in Covent Garden, and the other on Tower Hill."—1 *Ralph*. 961.



arraigned at the bar of a criminal court for defending their religion in accordance both with human and divine laws.<sup>1</sup>

In consideration of Herbert's past services, in enabling the King to appoint the members of his own religion to all civil offices under color of judicial decision,—instead of being at once reduced to the ranks he was transferred to the office of Chief Justice of the Common Pleas, where it was thought he could do little harm.

His notions of loyalty prevented him from making any complaint of an act done in the exercise of an undoubted prerogative of the Crown, and he quietly submitted to his fate. Jeffreys took care that he should be cut off from the chance of returning favor by having him forbidden to come to Whitehall; and as he was confined to the obscure duties of his office in considering dry questions of real property law, we read little more respecting him during the remainder of this reign.

Being sadly deficient in professional knowledge, and his puisnies, Street, Jenner, and Lutwyche, being almost equally incompetent, the decisions of the Common Pleas while he presided there are not reported, and we are not even amused by his blunders, which are said to have been many and grievous. He still supported the Government in as far as he thought he honestly could, and, in the summer circuit of 1688, "he declared the intention of the King to call a parliament in November at the farthest, recommending the choice of such members as would comply with the King's wishes in repealing the penal laws and tests."<sup>2</sup>

At the investigation instituted, when too late, to contradict the story that James's son (afterwards known by the name of the Old Pretender) was a supposititious child, brought into the Queen's bedchamber in a warming pan, Herbert attended as a privy councillor, and was of considerable service in conducting the examinations, which might have convinced all reasonable persons of the genuineness of the birth.<sup>3</sup>

The most honorable part of his career remains to be described. At the Revolution he did not, like Marlborough and others who had been loaded with Court favors, turn against his old master; nor did he, like some of James's councillors, who had remained true to him till he fled, attempt to make peace with the new Government. Forgetting the harsh [A. D. 1689.] usage which he had experienced, and conscientiously believing in the divine right of kings, he renounced his country, and followed into exile him whom he still considered his legitimate sovereign,—although his own brothers were William's staunchest supporters, and could easily have obtained his pardon on his making any concession to the new Government.

After the battle of the Boyne, when James finally settled at St. Germaine's, and formed his mock ministry there, he got a new great seal fabricated by an engraver at Paris. This he delivered to Sir Edward Herbert, with the title of "Lord Chancellor of England;" and the first use made of it was to affix it to a patent creating him Lord Portland, Baron Portland of Portland in the county of Dorset. He, no doubt,

<sup>1</sup> Burnet's Own Times, ii. 466.

<sup>2</sup> Rutt's Life of Calamy, i. 235, n.

<sup>3</sup> 12 St. Tr. 123.



hoped to return, a second Clarendon, to enjoy in his native land and office granted to him while a banished man : but he was destined, like his own father, to be never more than a titular Chancellor, and to end his days in exile. Forty-one years after the death of [A. D. 1698.] his father, at Paris, he died there, and was interred in the same cemetery.

As he had so openly taken part with the Jacobites, he was expressly excepted from the Act of Indemnity passed by King William and Queen Mary ; but this step was taken with reluctance, and, in the debates which led to it, strong testimony was borne to his good qualities :—

*Mr. Hawles* : “If I would consult my affection, this is a gentleman I would have pardoned. I know him an honest gentleman. If I would plead for any of them, it should be for him. But since the penalty of death is passed over, yet I would have a punishment, though a mild one, and except him.” *Sir Robert Cotton* : “Herbert did not come up to other judges, and order soldiers to be hanged for deserting their colors in time of peace.” *Mr. Kendal* : “I hope you will consider Lord Chief Justice Herbert for the sake of a noble person, his brother, who lately had your thanks for good services in the cause of our liberties.” *Mr. Holt* : “I had my education in Winchester College with Lord Chief Justice Herbert. I have discoursed this point of *dispensation* with him, and I can say it was his own true opinion ; for he aimed at nothing of preferment, and he went not so far as King James would have had him.” However, it was resolved without a division, “that Sir Edward Herbert be excepted out of the bill of indemnity, in respect of his having illegally decided that the King could dispense with the statutes of the realm.”<sup>1</sup>

He left no issue, and his title of *Portland* was given to the branch of the illustrious family of Bentinck settled in England. It is a curious fact that he, the youngest of the family, alone adhered to the Cavalier principles of old Sir Edward ; for the eldest brother, who rose to be a General in the army, fell fighting for King William in the battle of Aghrim,—while Arthur, the other brother, the famous Admiral Herbert, (subsequently Earl of Torrington,) after having resolutely opposed the suspension of the Test Act, favored the landing of the Prince of Orange, and was greatly instrumental in accomplishing the Revolution.<sup>2</sup>

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I now come to the last of the profligate Chief Justices of England, for since the Revolution they have all been men of decent character, and most of them have adorned the seat of justice by their talents and acquirements as well as by their virtues. SIR ROBERT WRIGHT, if excelled by some of his predecessors, in bold crimes, yields to none in ignorance of his profession, and beats them all in the fraudulent and sordid vices.

He was the son of a respectable gentleman who lived near Thetford, in Suffolk, and was the representative of an ancient family long seated at Kolverstone, in Norfolk ;<sup>3</sup> he enjoyed the opportunity of receiving a

<sup>1</sup> 5 Parl. Hist. 336.

<sup>2</sup> Burnet, ii. 365, 491, 510, 527 ; Wood's Fasti, “Chief Justice Herbert.”

<sup>3</sup> MS. in Coll. Armor., furnished to me by my friend Mr. Pulman.

good education at Thetford Free Grammar School, and at the University of Cambridge; and he had the advantage of a very handsome person and agreeable manner. But he was by nature volatile, obtuse, intensely selfish,—with hardly a particle of shame, and quite destitute of the faculty of distinguishing what was base from what was honorable. Without any maternal spoiling, or the contamination of bad company, he showed the worst faults of childhood, and these ripened, while he was still in early youth, into habits of gaming, drinking, and every sort of debauchery. There was a hope of his reformation when, being still under age, he captivated the affections of one of the daughters of Dr. Wren, Bishop of Ely, and was married to her. But he continued his licentious course of life, and, having wasted her fortune, he treated her with cruelty.

He was supposed to study the law at an Inn of Court, but when he was called to the bar he had not imbibed even the first rudiments of his profession. Nevertheless, taking to the Norfolk Circuit, the extensive influence of his father-in-law, which was exercised unscrupulously in his favor, got him briefs, and for several years he had more business than North (afterwards Lord Keeper Guilford), a very industrious lawyer, who joined the circuit at the same time. “But withal,” says Roger, the inimitable biographer, “he was so poor a lawyer that he could not give an opinion upon a written case, but used to bring such cases as came to him to his friend Mr. North, and he wrote the opinion on a paper, and the lawyer copied it and signed under the case as if it had been his own. It run so low with him, that when North was at London he sent up his cases to him and had opinions returned by the post; and in the mean time he put off his clients upon pretence of taking more serious consideration.”<sup>1</sup>

At last the attorneys found him out so completely that they entirely deserted him, and he was obliged to give up practice. By family interest he obtained the lucrative sinecure of “Treasurer to the Chest at Chatham,” but by his voluptuous and reckless course of life he got deeper and deeper in debt, and he mortgaged his estate to Mr. North for 1500*l.*, the full amount of its value. From some inadvertence the title-deeds were allowed to remain in Wright’s hands, and, being immediately again in want, he applied to Sir Walter Plummer to lend him 500*l.* on mortgage, offering the mortgaged estate as a security, and asserting that this would be the first charge upon it. The wary Sir Walter thought he would make himself doubly safe by requiring an affidavit that the estate was clear from all incumbrances. This affidavit Wright swore without any hesitation, and he then received the 500*l.* But the money being spent, [A. D. 1684.] and the fraud being detected, he was in the greatest danger of being sent to gaol for debt, and also of being indicted for swindling and perjury.

He had only one resource, and this proved available. Being a clever mimic, he had been introduced into the circle of parasites and buffoons who surrounded Jeffries, at this time Chief Justice of the King’s Bench, and used to make sport for him and his companions in their drunken

<sup>1</sup> Life of Guilford, ii. 173.

orgies by taking off the other judges, as well as the most eminent counsel. One day, being asked why he seemed to be melancholy, he took the opportunity of laying open his destitute condition to his patron, who said to him, "As you seem to be unfit for the bar, or any other honest calling, I see nothing for it but that you should become a judge yourself." Wright naturally supposed that this was a piece of wicked pleasantry, and, when Jeffreys had declared that he was never more serious in his life, asked how it could be brought about, for he not only felt himself incompetent for such an office, but he had no interest, and, still more, it so happened, unfortunately, that the Lord Keeper Guilford, who made the judges, was fully aware of the unaccountable lapse of memory into which he had fallen when he swore the affidavit for Sir Walter Plummer, that his estate was clear from all incumbrances, the Lord Keeper himself being the first mortgagee. *Jeffreys, C. J.*: "Never despair, my boy, leave all that to me."

We know nothing more of the intrigue with certainty, till the following dialogue took place in the royal closet. We can only conjecture that in the meanwhile Jeffreys, who was then much cherished at Court, and was impatient to supersede Guilford entirely, had urgently pressed the King that Wright might be elevated to the Bench as a devoted friend of the prerogative, and that, as the Lord Keeper had a prejudice against him, his Majesty ought to take the appointment into his own hands. But we certainly know that, a vacancy occurring in the Court of Exchequer, the Lord Keeper had an audience of his Majesty to take his pleasure on the appointment of a new Baron,—and that he named a gentleman at the bar, in great practice and of good character, as the fittest person to be appointed, thinking that Charles would nod assent with his usual easy indifference,—when, to his utter amazement, he was thus interrogated: "My Lord, what think you of Mr. Wright? Why may not he be the man?" *Lord Keeper*: "Because, Sir, I know him too well, and he is the most unfit person in England to be made a judge." *King*: "Then it must not be." Upon this, the Lord Keeper withdrew, without having received any other notification of the King's pleasure; and the office remained vacant.

Again there is a chasm in the intrigue, and we are driven to guess that Jeffreys had renewed his solicitation,—had treated the objections started to Wright as ridiculous,—and had advised the cashiering of the Lord Keeper if he should prove obstinate. The next time that the Lord Keeper was in the royal presence, the King, opening the subject of his own accord, observed, "Good my Lord, why may not Wright be a judge? He is strongly recommended to me; but I would have a due respect paid to you, and I would not make him without your concurrence. Is it impossible, my Lord?" *Lord Keeper*: "Sir, the making of a judge is your Majesty's choice, and not my pleasure. I am bound to put the seal as I am commanded, whatever the person may be. It is for your majesty to determine, and me, your servant, to obey. But I must do my duty by informing your Majesty of the truth respecting this man, whom I personally know to be a dunce, and no lawyer; who is not worth a groat,



having spent his estate by debauched living; who is without honesty, having been guilty of wilful perjury to gain the borrowing of a sum of money. And now, Sir, I have done my duty to your Majesty, and am ready to obey your Majesty's commands in case it be your pleasure that this man be a judge." The King thanked the Lord Keeper without saying more, but next day there came a warrant under the sign manual for creating the King's "trusty and well-beloved Robert Wright" a Baron of his Exchequer, and orders were given for making out the patent in due form.

Meanwhile, Jeffreys gave an instance of that grotesque buffoonery with which he loved to intermix his most atrocious actions. He wished to proclaim to the world, as a proof of his ascendancy, that he had promoted Wright to be a judge in spite of the Lord Keeper. Therefore, while the Lord Keeper was sitting on the bench, Jeffreys, arrayed in his costume as Chief Justice, entered Westminster Hall, and in the midst of a vast crowd of barristers and strangers walked up towards the Court of Chancery, which was then open to the hall: "he then beckoned to Wright to come to him, and, whispering in his ear, he flung him off, holding out his arms towards the Lord Keeper, as much as to say, 'in spite of that man above there, thou shalt be a judge.'" His Lordship "saw all this, as it was intended he should, and it caused him some melancholy."<sup>1</sup> But, rather than give up the great seal, his Lordship affixed it to Wright's patent; and the detected swindler, knighted and clothed in ermine, took his place among the twelve judges of England.

"Some may allege that I bring forward circumstances too minute; but I fancy myself a picture-drawer, and I am to give the same image to a spectator as I have of the thing itself, which I desire should be here represented. History is, as it were, the portrait or lineament, and not the bare index or catalogue, of things done; and without the *why* and the *how*, all history is jejune and unprofitable."<sup>2</sup> Therefore I should like to explain the motive of Jeffreys for such an appointment. He could not possibly have received a bribe for it, Wright not having a shilling in the world to give him; and it did not lead to the shedding of blood, whereby a natural taste of his might be gratified;—but he perhaps wished to have upon the bench a man whom he considered more obnoxious to censure than himself; or he might simply look to the gratification of his vanity, by showing his influence to be so great that, in spite of the Lord Keeper, he could elevate to be a Baron of the Exchequer a man whom no one else would have proposed for a higher office in the law than that of a *bound-bailiff*.<sup>3</sup> People were exceedingly shocked when they saw the seat of justice so disgraced; but this might

<sup>1</sup> Life of Guilford, ii. 175–176.

<sup>2</sup> Ib. 178.

<sup>3</sup> I have heard it repeated as a saying of a departed statesman, who long ruled over Scotland, that "a minister gains much more by appointing a worthless than a worthy man to a public office, for in the latter case only a few can hope for favor, whereas in the former the great mass of the population consider themselves within reach of the government patronage, and in consequence are eager to support you."



be what he intended; and one of his first acts, when he himself obtained the great seal, was to promote his *protege* [A. D. 1685.] from being a Baron of the Exchequer to be a Judge of the Court of King's Bench.

Wright continued to do many things which caused great scandal, and, therefore, was dearer than ever to his patron, who would have discarded him if he had shown any symptoms of reformation. He accompanied General Jeffreys as aid-de-camp in the famous "campaign [Oct. 11.] in the West:"—in other words, he was joined in commission with him as a Judge in the "bloody assize," and, sitting on the bench with him at the trial of Lady Lisle and the others which followed, concurred in all his atrocities.<sup>1</sup> He came in for very little of the bribery,—Jeffreys, who claimed the lion's share, tossing him by way of encouragement one solitary pardon, for which a small sum only was expected.

But on the death of Sir Henry Beddingfield he was made Chief Justice of the Common Pleas; and very soon afterwards, the unexpected quarrel breaking out between Sir Edward Herbert and the Government about martial law and the punishment of deserters,—the object being to find some one who by no possibility could go against the Government, or hesitate about doing any thing required of him however base or however bloody, Wright was selected as Chief Justice of the King's Bench. Unluckily we have no account of the speeches made at any of his judicial installations, so that we do not know in what terms his learning and purity of conduct were praised, or what were the promises which he gave of impartiality and of rigorous adherence to the laws of the realm.

On the very day on which he took his seat on the bench he gave good earnest of his servile spirit. The Attorney General renewed his motion for an order to execute at Plymouth the deserter who had been capitally convicted at Reading for deserting his colors.<sup>2</sup> The new Chief Justice, without entering into reasons, or explaining how he came to differ from the opinion so strongly expressed by his predecessor, merely said, "Be it so!" The puisnies now nodded assent, and the prisoner was illegally executed at Plymouth under the order so pronounced.<sup>3</sup>

Confidence was entirely lost in the administration of justice in Westminster Hall, for all the three Common Law courts were at last filled by incompetent and corrupt Judges. Pettifogging actions only were brought in them, and men settled their disputes by arbitration or by taking the opinion of counsel. The reports during the whole reign of James II. hardly show a single question of importance settled by judicial decision. Thus having no distinct means of appreciating Chief Justice Wright's demerits as a judge in private causes, we must at once follow him in his devious course as a political judge.

The first occasion on which, after his installation, he drew upon himself the eyes of the public was when he was sent down to Magdalene College, Oxford, for the purpose of turning [OCTOBER.]

<sup>1</sup> Granger's expression is, "He had his share in the Western massacre."—p. 311.

<sup>2</sup> Ante, p. 92.

<sup>3</sup> *Rex v. William Beale*, 3 Mod. 124-125.

it into a popish seminary. Upon a vacancy in the office of president, the fellows, in the exercise of their undoubted right, had elected the celebrated Dr. Hough, who had been duly admitted into the office; and the preliminary step to be taken was to annul the election, for the purpose of making way for another candidate named by the King. There were associated with Wright, in this Commission, Cartwright, Bishop of Chester, who was ready to be reconciled to Rome in the hope of higher preferment, and Sir Thomas Jenner, a Baron of the Exchequer, a zealous follower in the footsteps of the Chief Justice of the King's Bench. Nothing could equal the infamy of their object except the insolence of their behaviour in trying to accomplish it. They entered Oxford escorted by three troops of cavalry with drawn swords, and, having taken their seats with great parade in the hall of the college, summoned the fellows to attend them. These reverend and gallant divines appeared, headed by their new president, who defended his rights with skill, temper, and resolution; steadily maintaining that, by the laws of England, he had a freehold in his office, and in the house and revenues annexed to it. Being asked whether he submitted to this royal visitation, he answered:

"My lords, I do declare here, in the name of myself and the fellows, that we submit to the visitation as far as it is consistent with the laws of the land and the statutes of the college, and no further." *Wright, C. J.*: "You cannot imagine that we act contrary to the laws of the land; and as to the statutes the King has dispensed with them. Do you think we come here to break the laws?" *Hough*: "It does not become me, my Lords, to say so; but I will be plain with your Lordships. I find that your commission gives you authority to alter the statutes. Now I have sworn to uphold and obey them: I must admit no alteration of them, and by the grace of God never will." He was asked whether one of the statutes of the Founder did not require mass to be said in the college chapel; but he answered, "not only was it unlawful, but it had been repealed by the act of parliament requiring the use of the Book of Common Prayer." However, sentence was given, that the election of Hough was void, and that he be deprived of his office of president. *Hough*: "I do hereby protest against all your proceedings, all you have done, or shall hereafter do, in prejudice of me and my right, and I appeal to my sovereign lord the King in his courts of justice." "Upon which (says a contemporary account,) the strangers and young scholars in the hall gave a *hum*, which so much incensed their Lordships, that the Lord Chief Justice was not to be pacified, but, charging it upon the President, bound him in a bond of 1000*l.*, and security to the like value, to make his appearance at the King's Bench bar on the 12th of November; and, taking occasion to pun upon the President's name, said to him, "Sir, you must not think to *huff* us." He then ordered the door of the President's house to be broken open by a blacksmith; and a Fellow observing, "I am informed that the proper officer to gain possession of a freehold is the sheriff with a *posse comitatus*," Wright said, "I pray who is the best lawyer, you or I? Your Oxford law is no better than your Oxford

divinity. If you have a mind to a *posse comitatus*, you may have one soon enough."

Having ejected Hough, he issued a mandate for expelling all the contumacious Fellows, and insured the expulsion of James from his throne, the Commissioners returned in triumph to London.<sup>1</sup>

Wright was likewise a member of the Ecclesiastical Court of High Commission, of which Jeffreys was president, and he strenuously joined in all the judgments of that illegal and arbitrary tribunal, which with a *non obstante*, had been revived in the very teeth of an existing act of parliament. He treated with ridicule the scruples of Sancroft, the Archbishop of Canterbury, and others who refused to sit upon it, and he urged the infliction of severe punishment on all who denied its jurisdiction.

Although he was not a member of the Cabinet he usually heard from the Chancellor the measures which had been resolved upon there, and he was ever a willing tool in carrying them into effect.

When the clergy were insulted, and the whole country was thrown into a flame, by the fatal Order in Council for reading the "Declaration of Indulgence" in all churches and chapels on two successive Sundays, he contrived an opportunity of declaring from the bench his opinion that it was legal and obligatory. Hearing that the London Clergy were almost unanimously resolved to disobey it, he sent a peremptory command to the priest who officiated in the chapel of Serjeants' Inn to read the Declaration with a loud voice; and on the famous Sunday, the 20th of May, 1688, he attended in person, to give weight to the solemnity. However, he was greatly disappointed and enraged to find the service concluded without any thing being uttered beyond what the rubric prescribes. He then indecently, in the hearing of the congregation, abused the priest as disloyal, seditious, and irreligious, for contemning the authority of the Head of the Church. The clerk ingeniously came forth to the rescue of his superior, and took all the blame upon himself by saying that "he had forgot to bring a copy," and the Chief Justice, knowing that he had no remedy was forced to content himself with this excuse.<sup>2</sup>

The Seven Bishops being committed to the Tower, and prosecuted for a conspiracy to defame the King and to overturn his [A. D. 1688.] authority, because they had presented a petition to him praying that they might not be forced to violate their consciences and to break the law, Wright, the lowest wretch that had ever appeared on the bench in England, was to preside at the most important state trial recorded in our annals. The reliance placed upon his abject subserviency no doubt operated strongly in betraying the Government into this insane

<sup>1</sup> 12 St. Tr. 1—114.

<sup>2</sup> The two clergymen who were most applauded on this occasion were—the bold one, who, refusing to obey the royal mandate, took for his text, "Be it known unto thee, O King, that we will not serve thy Gods, nor worship the golden image which thou hast set up;" and the humorous one, who having said, "My brethren, I am obliged to read this Declaration, but you are not obliged to listen to it,"—waited till they were all gone, clerk and all, before the reading of the Declaration began.



project of treating as common malefactors the venerable fathers of the Protestant Church, now regarded by the whole nation with affectionate reverence. The consideration was entirely overlooked by the courtiers, that, from the notorious baseness of his character, his excessive zeal might be revolting to the jury, and might produce an acquittal. It is supposed that a discreet friend of the Government had given him a caution to bridle his impetuosity against the accused, as the surest way of succeeding against them; for, during the whole proceeding, he was less arrogant than could have been expected, and it is much more probable that his forbearance arose from obedience to those whom he wished to please, than from any reverence for the sacred character of the defendants or any lurking respect for the interests of justice.

They were twice placed at the bar before him; first when they were brought up by the Lieutenant of the Tower to be arraigned, and afterwards when a jury was empaneled for their trial. On the former occasion the questions were whether they were lawfully in custody, and were then bound to plead? The chief justice checked the opposing counsel with an air of impartiality, saying, "Look you, gentlemen, do not fall upon one another, but keep to the matter in hand." And, before deciding for the Crown, he said, "I confess it is a case of great weight, and the persons concerned are of great honor and value. I would be as willing as anybody to testify my respects and regards to my Lords the Bishops, if I could see anything in their objections worth considering. For here is the question, whether the fact charged in the warrant of commitment be such a misdemeanor as is a breach of the peace? I cannot but think it is such a misdemeanor as would have required sureties of the peace, and if sureties were not given a commitment might follow." He was guilty of gross injustice in refusing leave to put in a plea in abatement; but he thus mildly gave judgment:—"We have inquired whether we may reject a plea, and, truly, I am satisfied that we may if the plea is frivolous; and this plea containing no more than has been overruled already, my Lords the Bishops must now plead *guilty* or *not guilty*."

When the trial actually came on, he betrayed a partiality for which, [JUNE 29.] in our times, a judge would be impeached; but, compared with himself, so decorous was he, that he was supposed to be overawed by the august audience in whose presence he sat. It was observed that he often cast a side glance towards the thick rows of earls and barons, by whom he was watched, and who, in the next parliament, might be his judges. One bystander remarked that "he looked as if all the peers present had halters in their pockets."

The counsel for the Crown having, in the first instance, failed to prove a publication of the supposed libel in the county of Middlesex, and only called upon the Court to suppose or presume it, the Chief Justice said—"I cannot suppose it; I cannot presume anything. I will ask my brothers their opinion, but I must deal truly with you; I think there is not evidence against my Lords the Bishops. It would be a strange thing if we should go and presume that these Lords did it when there is no sort



of evidence to prove that they did it. We must proceed according to forms and methods of law. People may think what they will of me, but I always declare my mind according to my conscience. He was actually directing the jury to acquit, and the verdict of *not guilty* would have been instantly pronounced, when Finch, one of the counsel for the Bishops, most indiscreetly said they had evidence on their side to produce. The young gentleman was pulled down by his leaders, who desired the Chief Justice to proceed. And now his Lordship showed the *cloven foot*, for he exclaimed, "No, no, I will hear Mr. Finch. Go on: my Lords the Bishops shall not say of me that I would not hear their counsel. I have been already told of being counsel against them, and they shall never say I would not hear counsel for them. Such a learned man as Mr. Finch must have something material to offer. He shall not be refused to be heard by me, I assure you. Why don't you go on, Mr. Finch?"

At this critical moment it was announced that the Earl of Sunderland the President of the Council,—who was present in the royal closet when the Bishops presented their petition to the King at Whitehall,—was at hand, and would prove a publication in Middlesex. The Chief Justice then said, with affected calmness, but with real exultation, "Well! you see what comes of the interruption. I cannot help it; it is your own fault." There being a pause while they waited for the arrival of the Earl of Sunderland, the Chief Justice, addressing Sir Bartholomew Shower, one of the counsel for the Crown, whom he had stopped at an early stage of the trial, and against whom he had some private spite, he observed with great insolence, "Sir Bartholomew, now we have time to hear your speech, if you will. Let us have it."

At last the witness arrived, and, proving clearly a publication in Middlesex, the case was again launched, and, after hearing counsel on the merits, it was to be left to the determination of the jury.

The Chief Justice, thinking to carry it all his own way, was terribly baffled, not only by the sympathy of the audience with the Bishops, which evidently made an impression on the jury, but by the unexpected honesty of one of his brother judges, Mr. Justice John Powell, who had been a quiet man, unconnected with politics, and, being a profound lawyer, had been appointed to keep the Court of King's Bench from falling into universal contempt. Sir Robert Sawyer beginning to comment upon a part of the Declaration which the Bishops objected to, "that from henceforth the execution of all laws against nonconformity to the religion established, or the exercise of any other religion, should be suspended." *Wright, C. J.*, exclaimed, "I must not suffer this; they intend to dispute the King's power of suspending laws." *Powell, J.*: "My Lord, they must necessarily fall upon the point; for, if the King hath no such power (as clearly he hath not, in my judgment), the natural consequence will be that this Petition is no diminution of the King's regal power, and so not seditious or libellous." *Wright, C. J.*: "Brother, I know you are full of that doctrine; but, however, my Lords the Bishops shall have no occasion to say that I deny to hear their

counsel. Brother, you shall have your will for once; I will hear them; let them talk till they are weary." *Powell, J.*: "I desire no greater liberty to be granted them than what, in justice, the Court ought to grant; that is, to hear them in defence of their clients."

As the speeches for the defendants proceeded, and were producing a great effort upon all who heard them, the Solicitor General made a very irregular remark, accompanied by a fictitious yawn—"We shall be here till midnight." The Chief Justice instead of reprimanding him, chimed in with the impertinence, saying, "They have no mind to have an end of the cause, for they have kept it up three hours longer than they need to have done." *Serjeant Pemberton*: "My Lord, this case does require a great deal of patience." *Wright, C. J.*: "It does so, brother, and the Court has had a great deal of patience; but we must not sit here only to hear speeches." In trying to put down another counsel, who was making way with the jury, he observed, "If you say anything more, pray let me advise you one thing—don't say the same thing over and over again; for, after so much time spent, it is irksome to all company, as well as to me."

When it came to the reply of Williams, the renegade Solicitor General, who in his day had been "a Whig and something more," he laid down doctrines which called forth the reprobation of Judge Powell, and even shocked the Chief Justice himself, for he denied that any petition could lawfully be presented to the King except by the Lords and Commons in parliament assembled. *Powell, J.*: "This is strange doctrine. Shall not the subject have liberty to petition the King but in parliament? If that be law, the subject is in a miserable case." *Wright, C. J.*: "Brother, let him go on; we will hear him out, though I approve not of his position." The unabashed Williams continued, "The Lords may address the King in parliament, and the Commons may do it; but therefore that the Bishops may do it out of parliament, does not follow. I'll tell you what they should have done: if they were commanded to do anything against their consciences, they should have acquiesced till the meeting of the parliament." (Here, says the Reporter, the people in court hissed.) *Attorney General*: "This is very fine indeed: I hope the Court and the jury will take notice of this carriage." *Wright, C. J.*: "Mr. Solicitor, I am of opinion that the Bishops might petition the King; but this is not the right way. If they may petition, yet they ought to have done it after another manner; for if they may, in this reflective way, petition the King, I am sure it will make the government very precarious." *Powell, J.*: "Mr. Solicitor, it would have been too late to stay for a parliament, for the act they conceived to be illegal was to be done forthwith; and if they had petitioned and not shown the reason why they could not obey, it would have been looked upon as a piece of sullenness, and for that they would have been as much blamed on the other side."

The Chief Justice, to put on a semblance of impartiality, attempted to stop Sir Bartholomew Shower, who wished to follow in support of the prosecution, and, being a very absurd man, was likely to do more harm

than good. *Wright, C. J.* : "I hope we shall have done by and by." *Sir B. S.* : "If your Lordship don't think fit, I can sit down." *Wright, C. J.* : "No ! no ! Go on, Sir Bartholomew—you'll say I have spoiled a good speech." *Sir B. S.* : "I have no good speech to make, my Lord ; I have but a very few words to say." *Wright, C. J.* : "Well, go on, sir ; go on."

In summing up to the jury, the Chief Justice said :—

"This is a case of very great concern to the King and the Government on the one side, and to my Lords the Bishops on the other. It is an information against his Grace my Lord of Canterbury and the other six Noble Lords, for composing and publishing a seditious libel. At first we were all of opinion that there was no sufficient evidence of publication in the county of Middlesex, and I was going to have directed you to find my Lords the Bishops *not guilty* ; but it happened that, being interrupted in my direction by an honest, worthy, learned gentleman, the King's counsel took the advantage, and, informing the Court that they had further evidence, we waited till the Lord President came, who told us how the Petition was presented by the Right Reverend defendants to the King at Whitehall. Then came their learned counsel and told us that my Lords the Bishops are guardians of the Church, and great peers of the realm, and were bound in conscience to act as they did. Various precedents have been vouched to show that the kings of England have not the power assumed by his present Majesty in issuing the Declaration and ordering it to be read ; but concessions which kings sometimes make, for the good of the people, must not be made law ; for this is reserved in the King's breast to do what he pleases in it at any time.—The truth of it is, the dispensing power is out of the case, and I will not take upon me to give any opinion upon it now ; for it is not before me. The only question for you is a question of fact, whether you are satisfied that this Petition was presented to the King at Whitehall. If you disbelieve the Lord President, you will at once acquit the defendants. If you give credit to his testimony, the next consideration is, whether the Petition be a seditious libel, and this is a question of law on which I must direct you. Now, gentlemen, anything that shall disturb the government, or make mischief and a stir among the people, is certainly within the case '*De Libellis Famosis*;' and I must, in short, give you my opinion, I do take it to be a libel. But this being a point of law, if my brothers have anything to say to it, I suppose they will deliver their opinions."

Mr. Justice Holloway, though a devoted friend of the Government, had in his breast some feeling of shame, and observed,—

"If you are satisfied there was an ill intention of sedition or the like, you should find my Lords the Bishops *guilty* ; but if they only delivered a petition to save themselves harmless, and to free themselves from blame, by showing the reason of their disobedience to the King's command, which they apprehend to be a grievance to them, I cannot think it a libel." *Wright, C. J.* : "Look you, by the way, brother, I did not ask you to sum up the evidence (for that is not usual), but only to deliver



your opinion whether it be a libel or no." *Powell, J.*: "Truly, I cannot see, for my part, anything of sedition or any other crime fixed upon these reverend fathers. For, gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the King's counsel, nor anything as to the malice; it was presented with all the humility and decency becoming subjects when they approach their prince. In the Petition, they say, because they conceive the thing that was commanded them to be against the law of the land, therefore they do desire his Majesty that he would be pleased to forbear to insist upon it. If there be no such dispensing power, there can be no libel in the Petition which represented the Declaration founded on such a pretended power to be illegal. Now, gentlemen, this is a dispensation with a witness; it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of any in law, between the King's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament: all the legislature will be in the King—which is a thing worth considering—and I leave the issue to God and your own consciences."

Allybone, however, on whom James mainly relied, foolishly forgetting the scandal which would necessarily arise from the Protestant prelates being condemned by a Popish judge for trying to save their Church from Popery, came up to the mark, and, in the sentiments he uttered, must have equalled all the expectations entertained of him by his master:—

"In the first place," said he, "no man can take upon him to write against the actual exercise of the Government, unless he have leave from the Government. If he does, he makes a libel, be what he writes true or false; if we once come to impeach the Government by way of argument, it is argument that makes government or no government. So I lay down, that the Government ought not to be impeached by argument, nor the exercise of the Government shaken by argument. Am I to be allowed to discredit the King's ministers because I can manage a proposition, in itself doubtful, with a better pen than another man? This I say is a libel. My next position is, that no private man can take upon him to write concerning the Government at all, for what has any private man to do with the Government? It is the business of the Government to manage matters relating to the Government; it is the business of subjects to mind only their private affairs. If the Government does come to shake my particular interest, the law is open for me, and I may redress myself; but when I intrude myself into matters which do not concern my particular interest, I am a libeller. And, truly, the attack is the worse if under a specious pretence; for, by that rule, every man that can put on a good vizard may be as mischievous as he will, so that whether it be in the form of a supplication, or an address, or a petition, let us call it by its true denomination, it is a libel." He then examined the precedents which had been cited, displaying the grossest ignorance of the history as well as constitution of the country; and, after he had been sadly exposed by Mr. Justice Powell, he thus concluded: "I will



not further debate the prerogatives of the Crown or the privileges of the subject ; but I am clearly of opinion that these venerable Bishops did meddle with that which did not belong to them ; they took upon themselves to contradict the actual exercise of the Government, which I think no particular persons may do."

The Chief Justice, without expressing any dissent, merely said, "Gentlemen of the jury, have you a mind to drink before you go?" So wine was sent for, and they had a glass apiece ; after which they were marched off in custody of a bailiff, who was sworn not to let them have meat or drink, fire or candle, until they were agreed upon their verdict.

All that night they were shut up, Mr. Arnold, the King's brewer, standing out for a conviction till six next morning, when, being dreadfully exhausted, he was thus addressed by a brother jurymen : "Look at me ; I am the largest and the strongest of the twelve, and, before I find such a petition as this a libel, here I will stay till I am no bigger than a tobacco-pipe."

The Court sat again at ten, when the verdict of NOT GUILTY was pronounced, and a shout of joy was raised which was soon [JUNE 30.] reverberated from the remotest parts of the kingdom. One gentleman, a barrister of Gray's Inn, was immediately taken into custody in court, by order of the Lord Chief Justice, who, with an extraordinary command of temper and countenance, said to him in a calm voice : "I am as glad as you can be that my Lords the Bishops are acquitted, but your manner of rejoicing here in court is indecent ; you might rejoice in your chamber or elsewhere, and not here. Have you any thing more to say to my Lords the Bishops, Mr. Attorney?" A. G. : "No, my Lord." *Wright, C. J.* : "Then they may withdraw,"—and they walked off, surrounded by countless thousands, who eagerly knelt down to receive their blessing.<sup>1</sup>

Justice Holloway was forthwith cashiered, as well as Justice Powell ; and there were serious intentions that Chief Justice Wright should share their fate, as the King ascribed the unhappy [JAN. 9.] result of the trial to his pusillanimity,—contrasting him with Jeffreys, who never had been known to miss his quarry. This esteemed functionary held the still more important office of Lord High Chancellor, and, compared with any other competitor, Wright, notwithstanding his occasional slight lapses into conscientiousness, appeared superior in servility to all who could be substituted for him.<sup>2</sup> Allybone was declared

<sup>1</sup> St. Tr. 183—523.

<sup>2</sup> It was supposed that he was jealous of Williams, the Solicitor General, who had been promised by James the highest offices of the law if he could convict the Bishops. This may account for a sarcasm he levelled at his rival during the trial. Williams, having accounted for a particular vote of the House of Commons in the reign of James II., when he himself was a member and suspected of bribery, said "there was a lump of money in the case." Wright, in referring to this, observed, "Mr. Solicitor tells you the reason, 'there was a lump of money in the case;' but I wonder, indeed, to hear it come from him." Williams, understanding the insinuation, exclaimed, "My Lord, I assure you I never give my vote for money in my life."

to be "the man to go through thick and thin;" but, unfortunately, he had made himself quite ridiculous in all men's eyes by the palpable blunders he had recklessly fallen into during the late trial; and he felt so keenly the disgrace he had brought on himself and his religion, that he took to his bed and died a few weeks afterwards.

Thus, when William of Orange landed at Torbay, Wright still [DEC. 11.] filled the office of Chief Justice of the King's Bench. He continued to sit daily in court till the flight of King James, —when an interregnum ensued, during which all judicial business was suspended, although the public tranquillity was preserved, and the settlement of the nation was conducted by a provisional government.<sup>1</sup> After Jeffreys had tried to make his escape, disguised as a sailor, and was nearly torn to pieces by the mob, Wright concealed himself in the house of a friend, and being less formidable and less obnoxious (for he was called the "*jackall* to the *lion*,") he remained some time unmolested; but upon information, probably ill-founded, that he was conspiring with papists who wished to bring back the King, a warrant was granted against him by the Privy Council, on the vague charge of "endeavoring to subvert the government." Under this he was apprehended, and carried to the Tower of London; but after he had been examined there by a committee of the House of Commons, it was thought that this custody was too honorable for him, and he was ordered to be transferred to Newgate. Here, from the perturbation of mind which he suffered, he was seized with a fever, and he died miserably a few days after, being deafened by the cheers which were uttered when the Prince [FEB. 1689.] and Princess of Orange were declared King and Queen of England.<sup>2</sup>

His pecuniary embarrassments had continued even after he became a Judge, and, still living extravagantly, his means were insufficient to supply him with common comforts in his last hours, or with a decent burial. His end holds out an awful lesson against early licentiousness and political profligacy. He was almost constantly fighting against privation and misery, and during the short time that he seemed in the enjoyment of splendor he was despised by all good men, and he must have been odious to himself. When he died, his body was thrown into a pit with common malefactors; his sufferings, when related, excited no compassion; and his name was execrated as long as it was recollected.

The Convention Parliament, not appeased by his ignominious death, still wished to set a brand upon his memory. At first there was an intention of attainting him, as well as Jeffreys, who, about the same time, had come to a similar end. In the debate on the Indemnity Act, Sir Henry Capel said:—

"Will you not except the bloody Judges, and those who were of

<sup>1</sup> Westminster Hall was closed during the whole of Hilary Term, 1689, and an act was afterwards passed for reviving actions and continuing process (1 W. & M. c. 4.)

<sup>2</sup> Some accounts say that he was dangerously ill of a fever at the time of his removal from the Tower.

opinion for the dispensing power?" *Mr. Boscawen*: "Although the capital offenders are dead, I would have them attainted. Begin with Chancellor Jeffreys, reduce his estate to the same condition as when he began to offend, and let his posterity be made incapable to sit in the Lords' House." *Mr. Hawles*: "If you except a man that is dead, you will find the Chancellor very little more guilty than those who supported the dispensing power. The dispensing power was the last grievance, and a bloody sacrifice to the Prince's pleasure."

It was resolved first to specify the offences which should exclude from the benefit of the Act of Indemnity, and these were agreed upon:—"1. Asserting, advising, and promoting the dispensing power and suspending of laws without consent of parliament. 2. The prosecution of the Seven Bishops. 3. Sitting in the Court of High Commission."—Powell, Atkyns, Holloway, and other Judges who had been dismissed, were examined at the bar, and the part that Wright had taken in the illegal proceedings of the last reign was clearly established. Sir Robert Sawyer, then Attorney general, now a member of the House, likewise made some terrible disclosures (which led to his own expulsion) relating to the manner in which the King, the Chancellor, and the Chief Justice had combined to obtain the concurrence of the other Judges in illegal decisions. Finally, Sir Thomas Clarges alone stood up for Wright, saying, "If any fact he hath done amounts to felony or treason, make his estate forfeitable, and I am for it; but where there is no offence in law, I would not have him excepted; and as he has gone to another world, and left no estate behind him, let him rest in peace." But Sir Thomas Littleton closed the debate by observing, in a very fierce tone, "We may not be able to touch his person or his property, but it would be an ill thing for such a man to stand in our chronicles with no mark upon him." So it was resolved "that Sir Robert Wright be excepted."<sup>1</sup>

And surely we have reason to admire the good sense and moderation which characterised the proceedings of the Convention Parliament in this as well as in almost every other deliberation. We are shocked by reading, in the criminal annals of Scotland, of a skeleton being set up at the bar of a court of justice to receive sentence,—and the insult offered, on the restoration of Charles II., to the remains of Cromwell and Blake, was disgraceful to the English nation; but the simple expression of censure by the legislature of the country upon this deceased delinquent harmonises with our best feelings, and, without inflicting hardship on any individual, was calculated to make a salutary impression upon future judges. It is lucky for the memory of Wright that he had contemporaries such as Jeffreys and Scroggs, who considerably exceeded him in their atrocities. Had he run the same career in an age not more than ordinarily wicked, his name might have passed into a by-word, denoting all that is odious and detestable in a judge; whereas his misdeeds have long been little known, except to lawyers and antiquaries.

<sup>1</sup> 5 Parl. Hist. 260, 263, 278, 308, 312, 318, 324, 334, 339; stat. 2 W. & M. sess. 1, c. 10; Granger, 311; Macaulay, ii. 275.



It is a painful duty for me to draw them from their dread abode; but let me hope that, by exposing them in their deformity, I may be of some service to the public. Ever since the reaction which followed the passing of the Reform Bill, there has been a strong tendency to mitigate the errors and to lament the fate of James II. This has shown itself most alarmingly among the rising generation; and there seems reason to dread that we may soon be under legislators and ministers who, believing in the divine right of kings, will not only applaud, but act upon, the principles of arbitrary government.<sup>1</sup> Some good may arise from showing in detail the practical results of such principles in the due administration of justice—the chief object, it has been said, for which man renounces his natural rights, and submits to the restraints of magisterial rule.

I rejoice to think that I am now parting with the last of the monsters who, disguised as judges, shed innocent blood, and conspired with tyrants to overturn all the free institutions which have distinguished and blessed our country. For the purpose of showing the manner in which the laws had been perverted to the oppression of the subject, I may conclude with asking the reader to take a retrospective glance at the two last Stuart reigns, and to observe that during a period of only twenty-eight years there had been a series of not fewer than eleven Chief Justices of the Court of King's Bench, most of whom had been selected for their supposed subserviency, and several of whom were cashiered because, notwithstanding their eager desire to comply with the wishes of the Government, judgments had been required of them which they could not give without infamy, but which were given by their more infamous substitutes. The other judicial seats had been equally prostituted,—insomuch that although, on the establishment of the constitutional government under William and Mary, there was no indisposition to continue in office any of the old Judges who were decently competent by acquirements and character, it was found necessary to make a complete sweep of all actually officiating in the Court of Chancery, in the Court of King's Bench, in the Court of Common Pleas, and in the Court of Exchequer. Even of the Judges who had been dismissed as refractory, Sir Robert Atkyns and Mr. Justice John Powell alone could with propriety be reappointed. The others, condemned for independence by James II., would have been shunned, from the dread of contamination, by the pure and enlightened men subsequently appointed to adorn the seat of justice, which the least culpable of their predecessors, with unpardonable although with faltering and imperfect profligacy, had disgraced.<sup>2</sup>

<sup>1</sup> When in the debating societies at Eaton, Oxford, and Cambridge, the question has been put to the vote "whether the Revolution of 1688 was justifiable," it has generally been carried by an immense majority in the negative.

<sup>2</sup> The reader may like to see a list of the Judges immediately before and after the Revolution:—

JAMES II.

*Lord Chancellor.*

Lord Jeffreys.

WILLIAM AND MARY.

*Lord Commissioners of the Great Seal.*

Sir John Maynard.

Sir Anthony Keck.

Sir William Rawlinson.



## CHAPTER XXIII.

LIFE OF LORD CHIEF JUSTICE HOLT, FROM HIS BIRTH TILL THE COMMENCEMENT OF HIS CONTESTS WITH THE TWO HOUSES OF PARLIAMENT.

THE unprincipled, ignorant, and incompetent Chief Justices of the King's Bench, who have been exciting alternately the indignation and the disgust of the reader, were succeeded by a man of unsullied honor, of profound learning, and of the most enlightened understanding, who held the office for twenty-two years,—during the whole of which long period—often in circumstances of difficulty and embarrassment—he gave an example of every excellence which can be found in a perfect magistrate. To the happy choice of SIR JOHN HOLT as president in the principal common law court, and to his eminent judicial services, we may in no small degree ascribe the stability of the constitutional system introduced when hereditary right was disregarded, and the dynasty was changed. During the reigns of William and of Anne, factions were several times almost equally balanced, and many of the enormities of the banished race were forgotten; but when men saw the impartiality and mildness with which Chief Justice Holt conducted the trial of Lord Preston, who was undoubtedly guilty of high treason, and the firmness with which, in the discharge of his duty, he alternately defied the power of either House of Parliament, they dreaded a counter-revolution, by which he would have been removed to make place for a Jeffreys, a Scroggs, or a Wright.

Of all the Judges in our annals, Holt has gained the highest reputation, merely by the exercise of judicial functions. He was not a states-

## JAMES II.

*Master of the Rolls.*

Sir John Trenor.

*King's Bench.*

Sir Robert Wright.

Sir Thomas Powell.

Sir Robert Baldock.

Sir Thomas Stringer.

*Common Pleas.*

Sir Edward Herbert.

Sir Thomas Street.

Sir Thomas Jenner.

Sir Edward Lutwyche.

*Exchequer.*

Sir Robert Atkyns.

Sir Richard Heath.

Sir Charles Ingleby.

Sir John Rothram.

## WILLIAM AND MARY.

*Master of the Rolls.*

Henry Powle, Esq.

*King's Bench.*

Sir John Holt.

Sir William Dolben.

Sir William Gregory.

Sir Giles Eyre.

*Common Pleas.*

Sir Henry Pollexfen.

Sir John Powell.<sup>a</sup>

Sir Thomas Rokeby.

Sir Peyton Ventris.

*Exchequer.*Sir Robert Atkyns.<sup>a</sup>

Sir Nicholas Letchmere.

Sir Edward Neville.

Sir John Turton.

<sup>a</sup> Old Judges reappointed.

man like Clarendon, he was not a philosopher like Bacon, he was not an orator like Mansfield; yet he fills nearly as great a space in the eye of posterity; and some enthusiastic lovers of jurisprudence regard him with higher veneration than any English Judge who preceded or has followed him.

It would have been most interesting and instructive to trace the formation of such a character; but, unfortunately, little that is authentic is known of Holt till he appeared in public life; and for his early career we are obliged to resort to vague and improbable traditions.

He was of a respectable gentleman's family, seated in the county of Oxford.<sup>1</sup> His father tried, rather unsuccessfully, to eke out the income arising from a small patrimonial estate, by following the profession of the law, and rose to be a bencher of Gray's Inn. In 1677 he became a Serjeant, but was known by mixing in factious intrigues rather than by pleading causes in Westminster Hall. Of the party who were first called "*Tories*" he was one of the founders. Taking the Court side with much zeal, he was rewarded with knighthood, and became "Sir Thomas." Of course he was an "abhorrer" inveighing against the "Petitioners" as little better than traitors—in consequence of which he was taken into custody by order of the House of Commons. His celebrated son had strongly taken the other side in politics—but was no doubt shocked at this stretch of authority, and may then have imbibed the dislike which he afterwards evinced of the abuse of parliamentary privilege. The old gentleman soon after died, and if he had been childless his name never more would have been heard of.

But on the 30th of December, 1642, there had been born to him at [A. D. 1642.] Thame, at Oxfordshire, a son, the subject of this memoir, whom he lived to see rising into great eminence, and of whom he was justly proud, although he deplored his political degeneracy when he found him to be a Whig.

All that we certainly know of young John's boyish education is that he was seven or eight years at the Free School of the town of Abingdon, of which his father was Recorder. It is said, that during the whole of this time he was remarkable for being idle and mischievous—a statement which I entirely disbelieve. "The boy is the father of the man," and though there may be a supervening habit of dissipation—which may be conquered—the devoted application to business, the unwearied perseve-

<sup>1</sup> I have taken the following account of Ch. J. Holt's family, and the dates of the different events in his early career, from a Life of him published in the year 1763, with the motto from his epitaph—

"Libertatis, ac Legum Anglicarum  
Assertor, Vindex, Custos,  
Vigilis, Acer, et Intrepidus."

This, as a biography, is exceedingly meagre, but it seems very accurate, and it cites authorities, most of which I have investigated, but which I do not think it worth while to parade. See likewise an able Life of Holt in Welsby's "*Eminent English Judges*," which has been of considerable service to me in preparing this memoir.

rance, and the uniform self-control which characterized Sir John Holt, could only have been the result of a submission to strict discipline in early youth.

In his sixteenth year he was transferred to the University of Oxford, and entered a fellow commoner of Oriel College. Here [A. D. 1658.] he was guilty of great irregularities, although they have been probably much exaggerated, and might arise from his having been previously kept under excessive restraint. His biographers represent him as copying Henry V. when the associate of Falstaff, and not only indulging in all sorts of licentious gratifications, but actually being in the habit of taking purses on the highway. They even relate that many years after, when he was going the circuit as Chief Justice, he recognized a man, convicted capitally before him, as one of his own accomplices in a robbery, and that, having visited him in gaol and inquired after the rest of the gang, he received this answer, "Ah! my Lord, they are all hanged but myself and your Lordship!"<sup>1</sup>

Another story of his juvenile extravagance is well told by my friend Mr. Welsby:—

"Having prolonged one of his unlicensed rambles round the country, in company with some associates as reckless as himself, until their purses were all utterly exhausted, it was determined after divers consultations how to proceed, that they should part company, and try to make their way singly, each by the exercise of his individual wits. Holt, pursuing his separate route, came to the little inn of a straggling village, and, putting the best face upon the matter, commended his horse to the attentions of the ostler, and boldly bespoke the best supper and bed the house afforded. Strolling into the kitchen, he observed there the daughter of the landlady, a girl of about thirteen years of age, shivering with a fit of the ague; and on inquiring of her mother how long she had been ill, he was told nearly a year, and this in spite of all the assistance that could be had for her from physicians, at an expense by which the poor widow declared she had been half ruined. Shaking his head with much gravity at the mention of the doctors, he bade her be under no further concern, for she might assure herself her daughter should never have another fit: then scrawling a few Greek characters upon a scrap of parchment and rolling it carefully up, he directed that it should be bound upon the girl's wrist, and remain there till she was well. By good luck, or possibly from the effect of imagination, the ague returned no more, at least during a week for which Holt remained their guest. At the end

<sup>1</sup> Hanging was not formerly considered so very disgraceful and melancholy an occurrence as it is now. When I first came to London I frequented the famous CIDER CELLAR in *Maiden-Lane*, where I met Professor Porson, Matthew Raine, the Master of the Charter-House, and other men of celebrity. Among these was George Nichol, the King's bookseller, who, in answer to some reflections on the society who sometimes came there, answered, with an air of conscious dignity, "I have known the Cider Cellar these forty years, and during that time only two men have been hung out of it." At this time the Cellar was repaired, and Porson suggested for it the motto which it still bears—

"HONOS ERIT HUIC QUOQUE POMO."

of that time, having demanded his bill with as much confidence as if his pockets were lined with jacobuses, the delighted hostess, instead of asking for payment, bewailed her inability to pay *him* as she ought for the wonderful cure he had achieved, and her ill-fortune in not having lighted on him ten months sooner, which would have saved her an outlay of some forty pounds. Her guest condescended after much entreaty, to set off against his week's entertainment the valuable service he had rendered, and wended merrily on his way. The sequel of the story goes on to relate, that when presiding, some forty years afterwards, at the assizes of the same county, a wretched decrepid old woman was indicted before him for witchcraft, and charged with being in possession of a spell which gave her power to spread diseases among the cattle, or cure those that were diseased. The Chief Justice desired that this formidable implement of sorcery might be handed up to him; and there, enveloped in many folds of dirty linen, he found the identical piece of parchment with which he had himself played the wizard so many years before. The mystery was forthwith expounded to the jury; it agreed with the story previously told by the prisoner; the poor creature was instantly acquitted, and her guest's long-standing debt amply discharged."<sup>1</sup>

He had been early destined to the profession of the law, having been [Nov. 19, 1652.] entered on the books of Gray's Inn when he was only ten years old. His father was then treasurer of that society, and entitled to admit a son without a fee. Before he had completed his first year's residence at Oxford, such were his excesses, and such were the complaints which they called forth, that Sir Thomas thought the only chance of saving him from utter ruin was a change of scene, of company, and of pursuits. Accordingly he was brought to London, he was put under the care of a sober attorney, and he was [A. D. 1660.] required to keep his terms with a view to his being called to the bar. The experiment had the most brilliant success. His reformation was at once complete; and, without taking any vow, like Sir Matthew Hale, against stage plays and drinking, or renouncing society to avoid temptation, he applied ardently to the study of the law, and his moral conduct was altogether irreproachable.

Unfortunately we have no particular account of the manner in which he rendered himself so consummate a jurist. "Moots" and "Readings" at the Inns of Courts were going out of fashion; and the ponderous common-place book, by which every student was expected to make out for himself a *Corpus Juris Anglicani*, was, since the publication of *ROLLE* and other compilations, thought rather a waste of labor. I suspect that, after acquiring a knowledge of practice from his attorney-tutor, young Holt improved himself chiefly by the diligent perusal of well-selected law books, and by a frequent attendance in the courts at Westminster when important cases were to be argued. By an intuitive faculty not to be found in your mere **black-letter** lawyer, he could distinguish genuine law, applicable to real business, from antiquated rubbish, of no service but to show a familiarity with the YEAR-BOOKS.

<sup>1</sup> *Lives of Eminent English Judges*, p. 91.



He made himself master of all that is useful in our municipal code, and, from his reasoning in *Coggs v. Barnard* and in other cases, it is evident that he must have thoroughly imbued his mind with the principles of the Roman civil law. If he once took delight in classical studies, he now renounced them; and he never wandered into philosophy, or even cared much about the polite literature of his own country. But he mixed occasionally in general society, and picked up much from conversation; so that he was well acquainted with the actual business of life, and had a keen insight into character. His *mother-wit* was equal to his *clergy*.

Soon after he came of age he was called to the bar; a wonderful precocity in those days, when a training of seven or eight years, after taking a degree at a university, [FEB. 27, 1663-4.] was generally considered necessary before putting on the long robe. His juvenile appearance seems to have been adverse to his success, as for some years he was still dependent on his father's bounty for his subsistence. He sought for practice in the Court of King's Bench, and rode the Oxford Circuit, but long remained without clients. Being advised to try his luck in the Court of Chancery, he expressed an unbecoming contempt for our equitable system, which certainly was then in a very crude state, and he professed a determined resolution to make his fortune by the common law.

He still read diligently, and took notes of all the remarkable cases which he heard argued. When he was at last found out, business poured in upon him very rapidly. He was noted for doing it not only with learning always sufficient, but with a remarkable good sense and handiness; so that he won verdicts in doubtful cases, and was noted for having "the ear of the court." Yet he would not stoop for victory, to any unbecoming art, and always maintained a character for straightforwardness and independence. His name frequently appears as counsel in routine cases in the King's Bench Reports about the middle of the reign of Charles II., and he was soon to gain distinction in political prosecutions which interested the whole nation.

He always showed in domestic life much reverence, as well as affection for his father; but on public affairs he thought for himself, and he decidedly preferred the "country party." He had regarded with horror the iniquities of the infamous CABAL, and he associated himself with those who were struggling for the principles of civil and religious liberty. He was tainted with the rage against Popery, from which no patriot was then free; but, although a sincere member of the Church of England, he was for extending a liberal toleration to all orthodox Dissenters. With these principles, and his professional eminence, he was sure to be of service to his country in the struggles that were then going forward between the contending parties in parliament and in the courts of law.

The first *cause célèbre* in which he was engaged was the impeachment of the Earl of Danby. The King, dreading the disclosures which might be made in investigating the charges against [A. D. 1679.] his prime minister, had granted him a pardon, to which with his own

royal hand he had affixed the great seal; but the Commons, allowing that it was within the power of the prerogative to remit the sentence after it had been pronounced, denied that a pardon could be pleaded in bar of an impeachment. The Lords received the plea, and assigned Mr. Holt as counsel for the defendant to argue its validity; the understood rule then being (as had been settled in the case of the Earl of Strafford) that upon an impeachment the defendant might have the assistance of counsel on any question of law, although not to argue the merits of the accusation. The Commons were now so unreasonable as to pass a resolution "That no commoner whatsoever shall presume to maintain the validity of the pardon pleaded by the Earl of Danby, without the consent of this House first had; and that the persons so doing shall be accounted betrayers of the liberties of the Commons of England."<sup>1</sup> Holt remained undismayed, and would manfully have done his duty at the peril of being seized by the Serjeant-at-arms and lodged in "Little Ease." But the King put an end for the present to the controversy between the two Houses by an abrupt dissolution of that Parliament which had sat seventeen years, which on its meeting was ready to make him an absolute sovereign, but which now seemed disposed to wrest the sceptre from his hand.<sup>2</sup>

Holt was afterwards assigned by the Lords to be counsel for the Earl of Powis and Lord Bellasis, two of the five Popish peers capitally impeached on the charge of being concerned in the Popish Plot, which was converted into high treason, the murder of the King being one of its supposed objects.<sup>3</sup> However, the unhappy Lord Strafford was alone brought to trial, and his murder caused such a reaction in the public mind that the other intended victims were released when they seemed inevitably doomed to share his fate.

By one of the professional accidents to which all men at the bar are [A. D. 1680.] liable, from not being at liberty to refuse a retainer, Holt was next associated with Sir George Jeffreys in prosecuting a bookseller for publishing a pamphlet alleged to be libellous and seditious, because it attempted to discredit the testimony of the witnesses against those who had died as authors of the Popish Plot. There might have been a design to influence the jury by presenting before them as counsel, in support of a tale which was becoming unpopular, one who was known to have opposed it when few had had courage to express a doubt of its most improbable fictions.

Mr. Holt had merely, as junior, to open the pleadings, and was followed by his leader, who delivered a glowing panegyric on Lord Chief Justice Scroggs, and denounced all who did not believe in the Popish Plot as traitors, regretting that the present defendant was only indicted for a misdemeanor, so that his punishment could not be carried beyond fine, imprisonment, whipping, and pillory. This harangue caused such consternation that the defendant submitted to a verdict of GUILTY, although, on the part of the prosecution, they seem not to have been prepared to prove that he had published the obnoxious pamphlet.<sup>4</sup>

<sup>1</sup> 11 St. Tr. 807.

<sup>2</sup> 5 Parl. Hist. 1074.

<sup>3</sup> 7 St. Tr. 1212, 1260.

<sup>4</sup> Rex v. Smith, 7 St. Tr. 931.

In the next case in which we find Holt engaged, his duties as an advocate and his political propensities fully coincided: he was counsel for Lord Russell. But, in those days, a [A. D. 1683.] barrister had little opportunity for a display of talent or zeal in the defence of persons accused of high treason; for his mouth was closed, and, indeed, his capacity of advocate was not acknowledged by the Court, except when some question of law incidentally arose during the trial. During the impanneling of the jury, exception was made to one of them, on behalf of the prisoner, for not having a freehold; and the question was raised "whether it was required, either by the common law or statute, that, on trial for treason, jurymen should be freeholders?" This was very learnedly argued by Holt; but all his authorities and reasonings were overruled.<sup>1</sup> During the remainder of the trial he had to look on as a mere spectator,—while the illustrious prisoner, assisted only by an heroic woman, in vain struggled against the chicanery of the counsel for the Crown, and the browbeating of corrupt Judges. Holt's own upright and merciful demeanor in the seat of justice may, in part, be ascribed to the horror which the closing scene of this sad tragedy was calculated to inspire.

In civil cases, eager for victory, he seems not to have been very scrupulous as to the arguments he urged, but—according to the American phrase, now naturalized in Westminster Hall,—to have "gone the whole hog." Thus, in the case of the *East India Company v. Sandys*, in which the question was, whether the King's grant to the plaintiffs of an exclusive right to trade to all countries east of the Cape of Good Hope gave them a right of action against all who infringed their monopoly, he boldly argued that, although such a grant touching the Christian countries of Europe might be bad if not confirmed by Parliament, the King's subjects had no right to hold intercourse of any kind with *Infidels* without the express authority of the Crown; citing Lord Coke's doctrine that "Infidels are perpetual enemies," and the Book of Judges, which shows "how the children of Israel were perverted from the true religion by converse with the heathen nations round about, from whom they took wives and concubines."<sup>2</sup> On this occasion he laid himself open to the severe sarcasm of his opponent, Sir George Treby, who observed, "I did a little wonder to hear merchandizing in the East Indies objected against as an unlawful trade, and did not expect so much divinity in the argument: I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical." Jeffreys, however, was the Judge, and he fully adopted the argument that the King's license alone can legalize a trading with infidels; adding sentiments which will make true protectionists venerate his memory: "This island supported its inhabitants in many ages without any foreign trade at all, having in all things necessary for the life of man—*Terra suis contenta bonis, non indiga mercis*. And truly I

<sup>1</sup> The refusal of a challenge to the jurors for want of freehold was made one of the principal grounds for reversing the attainder, 9 St. Tr. 696.

<sup>2</sup> 10 St. Tr. 519; Lives of the Chancellors, v. 585.



think, if at this day East India commodities were absolutely prohibited, though some few traders might be mulcted of enormous gains, it would be for the general benefit of the inhabitants of this realm." So Holt had the triumph, and, I fear was not ashamed of it; although, when he was himself on the bench, he would sooner have died than have pronounced such a judgment.<sup>1</sup> His most creditable appearance at the bar was in the case of the *Earl of Macclesfield v. Starkey*,<sup>2</sup> in which the question arose, "whether an action for defamation could be maintained against a grand jurymen for joining in a presentment at the assizes which charged the plaintiff and other gentlemen of the county of Chester as promoters of schism, disaffection, and infidelity, because they had signed an address to Whig members of parliament, commending the principles of that party?" Holt was for the defendant, and, in a most masterly manner, entered into the distinction between publications that are criminatory and malicious, and publications that are criminatory without being malicious; showing that no persons are to be sued for acting in the discharge of their duty with a view to the public good, although the character of individuals might thereby be prejudiced; and laying down with wonderful force the grand principle on which the legislature in our time passed the act *declaring* that the two Houses of Parliament have the right to publish whatever they deem necessary for the information of the community without the danger of an action or indictment against their officers. He succeeded; less, probably, from the force of his argument, than from the fact that the defendant was a violent Tory, and that the presentment was highly agreeable to the Government.

Although ever consistent and zealous in his Whig principles, Holt never associated himself with Shaftesbury, nor entered into the plots which exposed the leaders of the party to the penalties of treason; and, when James II. came to the throne, so moderate did he appear that an attempt was made to gain him over to the Court, and a hope was entertained that he might prove a useful tool in carrying on the scheme which had been deliberately concerted for the subversion of public liberty.

By the famous QUO WARRANTO, the charters of London had been adjudged to be forfeited, and the appointment of all the city officers was in the Crown. Sir Thomas Jenner had accordingly been made Recorder by royal mandate, without the intervention of the aldermen or the common council; and when he was promoted to be a Baron of the Exchequer, the vacant Recordership was offered to Mr. Holt. [FEB. 1686.] Although not unaware of the motive by which the Government was actuated, he thought he was not at liberty to refuse a judicial office, and he accepted it, fully determined, in a resolute manner, to perform its duties. He actually seemed, for a short space, to be likely to become an associate of Jeffreys, for, having taken the degree of the coif,<sup>3</sup> he was immediately promoted to the high dignity of King's Ser-

<sup>1</sup> 10 St. Tr. 371.

<sup>2</sup> Ibid. 1351.

<sup>3</sup> On this occasion he gave rings with this motto—"Deus, Rex, Lex," which is noticed by Bishop Kennet as honorably distinguished from that of the last preceding batch of serjeants,—“A Deo Rex, a Rege Lex,” setting the King above the Law.



jeant, and had the honor of knighthood conferred upon him. [APRIL 22.] But he was soon called upon either to maintain his integrity and to sacrifice office, or really to be degraded to the level of the corrupt Judges who were ready to act according to the orders they received from the ministers of the Crown.

James II. hoped to subvert the religion of the country by the exercise of his dispensing power, and its liberties by keeping up a standing army in time of peace, without the authority of parliament. All his Judges in Westminster Hall, with the exception of Baron Street, had decided that, in spite of acts of parliament requiring the oath of supremacy and the declaration against transubstantiation, he might appoint a Roman Catholic to any office, civil, military, or ecclesiastical; and all these perverters of the laws, except Chief Justice Herbert and Justice Wythens, had given an opinion that an old statute of Edward III. against desertion in time of war empowered the King to keep up, and to rule by martial law, an army raised by his own authority, at a time when he had no foreign enemy and there was pro- [JAN. 1687.] found tranquillity at home. Both these questions incidentally arose before Holt, sitting as Recorder at the Old Bailey sessions; and he firmly declared, that although the dispensing power claimed by the Crown had been applied, from ancient times, to statutes imposing pecuniary penalties given to the King, it could not extend to a statute imposing a test to protect the religion of the nation; and that although the King by his prerogative might enlist soldiers, even in time of peace, still, if there was no statute passed to punish mutiny, and to subject them to a particular discipline, they could not be punished for any military offence, and they were only amenable to the same laws as the rest of the King's subjects. The Recordership of London being, under the existing *regime*, held during the pleasure of the Crown, Holt was immediately removed from it, and was replaced by an obscure Serjeant-at-law, of the name of Tate, who had the recommendation of being ready to hold that the King of England was as absolute as the Grand Signor.

By a refinement of malice he was allowed to continue King's Serjeant, for in the state prosecutions which were impending he was thus effectually prevented from acting as counsel for the accused, while it was necessary to employ him for the Crown. Accordingly, he was not trusted with a brief to assist in trying to convict the Seven Bishops; and they, being deprived of his advocacy, which they would have been eager to secure, were obliged to employ several counsel who were suspected to be under the influence of the Government,—and might have been betrayed, if Mr. Somers, till then unknown, had not been added to their number.<sup>1</sup>

But Holt was summoned, in his capacity as King's Serjeant, to attend

<sup>1</sup> The Diary of the second Lord Clarendon shows that Holt, as King's Serjeant, was obliged to refuse taking a brief for the plaintiff in a suit against the Queen Dowager Catherine of Braganza, although he was not employed for her. The noble diarist, not aware of professional etiquettes, seems to have been very angry; and declares that the only honest lawyers he ever met with were two "thorough Tories" like himself, Roger North and Sir Charles Porter.

[A. D. 1688.] the Council assembled by the King, when it was too late, to investigate the circumstances of the birth of the Prince of Wales, and to expose the calumnious story that a supposititious child had been introduced in the Queen's bed-chamber in a warming-pan. He assisted in examining the witnesses who proved so satisfactorily her pregnancy and her delivery, and in drawing up the declaration by which an ineffectual attempt was made to disabuse the public mind.

I do not find that Holt joined in the invitation to the Prince of Orange, or that he took any active part in the revolutionary movement till after the flight of King James—when the throne, by all good Whigs, was considered vacant. He then declared that he was completely released from his allegiance to the abdicated monarch, and exerted himself to bring about a settlement which, disregarding hereditary right, should establish a constitutional monarchy, justly esteemed by him the best guarantee for true freedom.

When the Peers first meet and formed a provisional government, as [DEC. 11.] they could have no confidence in the legal advice of the Judges, Holt, with several other liberal lawyers, attended them as their assessors, and concurred in the proceedings which terminated in the Prince of Orange summoning the Convention Parliament.<sup>1</sup>

He was not one of the members originally returned to the House of [JAN. 22, 1689.] Commons on this occasion; and when the session began, as King's Serjeants had been accustomed to have a summons to the House of Lords, he took his place on the wool-sack, from which the Judges were banished, and guided their Lordships in the forms to be observed in reconstructing the constitution.<sup>2</sup> But it was thought that his presence in the Lower House might be more advantageous; and Serjeant Maynard, who had been returned both for Plymouth and Beeralston, having elected to serve for the former borough, Serjeant Holt was chosen by the latter,—which was represented for a great many years by such a succession of patriotic lawyers, that we might almost be reconciled to close boroughs if the scandal caused by them could be forgotten.

On taking his seat, he found the controversy raging between the two Houses respecting the terms in which King James' flight should be described; the Commons having proposed the expression that "he had *abdicated* the throne," and the Lords insisting on the word "deserted." This was by no means a foolish fight about equipollent language, as it is generally described; for "abdication" was to lead to the appointment of a new occupier of the vacant throne, and "desertion" to the appointment of a regency to govern for the lineal heir. Holt was deemed a great acquisition by the "abdicationists," and he was immediately added to the committee of managers intrusted with the duty of debating the question in *open conferences* with the opposing managers of the Lords. His speech in the Painted Chamber (almost the only specimen of his parliamentary powers) is preserved to us. He followed immediately after

<sup>1</sup> 5 Parl. Hist. 19, 21, 24.

<sup>2</sup> Lords' Journals, 5 Parl. Hist. 32.

Mr. Somers, who had treated the subject very learnedly, and thus he proceeded :—

“My Lords, I am commanded by the Commons to assist in the management of this conference. As to the first of your Lordship’s reasons for your amendment (with submission to your Lordships,) I do conceive it not sufficient to alter the minds of the Commons, or to induce them to change the word ‘abdicated’ for your Lordships’ word ‘deserted.’ Your Lordships first say that ‘abdicate’ is a word not known to the common law of England. But, my Lords, the question is not so much whether it be a word as ancient as the common law, for the Commons would be justified in using it if it be a word of known and certain signification. It is derived from *dico*, an ancient Latin word, and it is frequently used by Cicero and the best Roman writers. But that it is a known English word, and of a known and certain signification with us, I will prove to you by the dictionary of our countrymen Minshew. He has ‘abdicate,’ as an English word, and says that it signifies to ‘renounce,’ which is the signification which the Commons would put upon it. So that I hope your Lordships will not find fault with their using a word so ancient in itself, and with such a certain signification in the vernacular tongue. Then, my Lords, your objection that it is not a word known to the common law of England, surely cannot prevail, for your Lordships very well know we have very few words in our tongue that are of equal antiquity with the common law; your Lordships know the language of England is altered greatly in the succession of ages and the intermixture of other nations; and if we were obliged to make use only of words current when the common law took its origin, what we should deliver in such a dialect would be very difficult to be understood. Then your Lordships tell us that ‘abdication,’ by the civil law, is ‘a voluntary express act of renunciation.’ I do not know if your Lordships mean a *renunciation by formal deed*. If you do, I confess I know of none executed by King James before he withdrew from the realm. But, my Lords, both by the civil law, and by the common law, and by common sense, there are express acts of renunciation which are not by deed; for, if your Lordships please to observe, government is under a trust, and a deliberate violation of that trust is an express renunciation of it, although not by formal deed. How can a man in reason or sense more strongly express a renunciation of a trust than by subverting it, his actions declaring more strongly than any words spoken or written could do that he utterly renounces it? Therefore, my Lords, I can only repeat in conclusion, that the doing an act inconsistent with the being and end of a thing shall be construed a renunciation or abdication of that thing.”<sup>1</sup>

The Lords, probably, were not much convinced by such reasoning; but, finding public opinion strongly against them, and alarmed by William’s threat that, if a regency should be longer struggled for, he would return to Holland, they yielded,—the throne was formally declared to be vacant, and a joint address of the two Houses was presented to the



Prince and Princess of Orange, requesting them to take possession of it as King and Queen.

No sooner were they proclaimed than a patent was made out for Sir [FEB. 13.] John Holt as their Prime Serjeant, and he took the oaths of allegiance to them. After the "Convention" had been turned into a "Parliament," he spoke only in one debate during the short time he remained a member of the House of Commons. This was [FEB. 25.] on the difficult question, "What was to become of the taxes which had been voted during the life of James II.?" Serjeant Holt contended that they were still payable, as James II., though he had ceased to reign, was still alive, and that they passed with the Crown to King William and Queen Mary. He urged, with much subtlety, that the grant had been made to the Crown of England during the life of an individual, and, therefore, while this individual survived, those wearing the crown were entitled to the benefit of it.<sup>1</sup> The more prudent course, however, was adopted of making a fresh grant of the taxes to the new sovereigns.

Holt does not appear to have taken any part in framing the "Declaration of Rights" or the "Bill of Rights." I do not think that he ever would have been a great debater, or would have acquired much reputation as a statesman. The felicity of his lot proved to be, that he was placed in the situation of all others the best adapted to his natural abilities, to his acquirements, and to his character.

William and his ministers were laudably anxious to elevate to the bench the most learned and upright men that could be found in the profession of the law, the corruption and incompetency of the Judges having been one of the chief grounds on which the nation had resolved upon a change of dynasty. Great deliberation was necessary for this purpose, and fortunately there was time to devote to it. Judicial business had been entirely suspended since the late King's flight; and during Hilary Term, which ended on the 12th of February, all the courts in Westminster Hall had been closed. After many consultations,—to avoid all favoritism, the following plan was adopted: that every privy councillor should bring a list of the twelve persons whom he deemed the fittest to be the twelve Judges; and that the individuals who had the greatest number of suffrages should be appointed. It is a curious fact, that, howsoever the lists of the different privy councillors varied, they all agreed in first presenting the name of Sir John Holt;—such was his reputation for law,—such satisfaction had he given in dispensing justice when Recorder of London,—and in such respect was he held for his consistent career in public life. The King willingly ratified this choice, and when the appointment was announced in the London Gazette it was hailed with joy by the whole nation.<sup>2</sup> The new Chief Justice was sworn in before the Commissioners of the Great Seal on the 19th of April, and

<sup>1</sup> 5 Parl. Hist. 140—174.

<sup>2</sup> Own Times, iii. 6. At the same time he was elected a Governor of the Charter-House in the room of Lord Chancellor Jeffreys.—Corresp. of E. of Clar. ii. 276.



took his seat in the Court of King's Bench on the first day of Easter Term following.<sup>1</sup>

According to the ancient traditions of Westminster Hall, the anticipation of high judicial qualities has been often disappointed. The celebrated advocate, when placed on the bench, embraces the sides of the plaintiff or of the defendant with all his former zeal, and—unconscious of partiality or injustice—in his eagerness for victory becomes unfit fairly to appreciate conflicting evidence, arguments and authorities. The man of a naturally morose or impatient temper, who had been restrained while at the bar by respect for the ermine, or by the dread of offending attorneys, or by the peril of being called to a personal account by his antagonist for impertinence,—when he is constituted a living oracle of the law,—puffed up by self-importance, and revenging himself for past subserviency, is insolent to his old competitors, bullies the witnesses, and tries to dictate to the jury. The sordid and selfish practitioner, who, while struggling to advance himself, was industrious and energetic, having gained the object of his ambition, proves listless and torpid, and is quite contented if he can shuffle through his work without committing gross blunders or getting into scrapes. Another, having been more laborious than discriminating, when made a judge, hunts after small or irrelevant points, and obstructs the business of his court by a morbid desire to investigate fully and to decide conscientiously. The recalcitrant barrister, who constantly complained of the interruptions of the court, when raised to the bench forgets that it is his duty to listen and be instructed, and himself becomes a by-word for impatience and loquacity. He who retains the high-mindedness and noble aspirations which distinguished his early career may, with the best intentions, be led astray into dangerous courses, and may bring about a collision between different authorities in the state which had long moved harmoniously, by indiscreetly attempting new modes of redressing grievances, and by an uncalled-for display of heroism.

None of these errors could be imputed to Holt. From his start as a magistrate he exceeded the high expectations which had been formed of him, and during the long period of twenty-two years he constantly rose in the admiration and esteem of his countrymen. To unsullied integrity and lofty independence, he added a rare combination of deep professional knowledge with exquisite common sense. According to a homely but expressive phrase, "there was no rubbish in his mind." Familiar with the practice of the court as any clerk,—acquainted with the rules of special pleading as if he had spent all his days and nights in drawing declarations and demurrers,—versed in the subtleties of the law of real property as if he had confined his attention to conveyancing,—and as a commercial lawyer much in advance of any of his contemporaries,—he ever reasoned logically,—appearing at the same time instinctively acquainted with all the feelings of the human heart, and versed by experience in all the ways of mankind. He may be considered as having a genius for magistracy, as much as our Milton had for poetry, or our

<sup>1</sup> He was sworn a member of the Privy Council, August 25, 1689.

Wilkie for painting. Perhaps the excellence which he attained may be traced to the passion for justice by which he was constantly actuated.— This induced him to sacrifice ease, and amusement, and literary relaxation, and the allurements of party, to submit to tasks the most dull, disagreeable, and revolting, and to devote all his energies to one object, ever ready to exclaim—

. . . . “Welcome business, welcome strife,  
Welcome the cares of ermined life;  
The visage wan, the purblind sight,  
The toil by day, the lamp by night,  
The tedious forms, the solemn prate,  
The pert dispute, the dull debate,  
The drowsy bench, the babbling hall,—  
For thee, fair JUSTICE, welcome all !!!”

Holt derived much advantage in his own time from the contrast between him and the Judges who had recently preceded him. Accordingly his contemporaries speak of him with enthusiasm. Burnet, after giving an account of the manner in which the Revolution Judges were selected, says, “The first of these was Sir John Holt, made Lord Chief Justice of England, then a young man for so high a post, who maintained it all his time with a great reputation for capacity, integrity, [A. D. 1689–1710.] courage and dispatch.”<sup>1</sup> Said the TATLER, “He was a man of profound knowledge of the laws of his country, and as just an observer of them in his own person. He considered justice as a cardinal virtue, not as a trade for maintenance. The criminal before him knew that, though his spirit was broken with guilt, and incapable of language to defend itself, his judge would wrest no law to destroy him, nor conceal any that would save him. He never spared vice; at the same time he could see through the hypocrisy and disguise of those who have no pretence to virtue themselves but by their severity to the vicious.”<sup>2</sup>

The lustre of his fame in later times has been somewhat dimmed by our being accustomed to behold judges little inferior to him; but we ought to remember that it is his light which has given the splendor to these luminaries of the law. During a century and a half, this country has been renowned above all others for the pure and enlightened administration of justice; and Holt is the model on which, in England, the judicial character has been formed.

He complained bitterly of his reporters, saying that the *skimble-scamble stuff* which they published would “make posterity think ill of his understanding, and that of his brethren on the bench.” He chiefly referred to a collection of Reports called “MODERN,” embracing nearly the whole of the time when he sat on the bench,—which are composed in a very loose and perfunctory manner. More justice is done to him by Salkeld, Carthew, Levinz, Shower, and Skinner,—but these do little more than state drily the points which he decided, and we should have been left without any adequate memorial of his judicial powers had it not been

<sup>1</sup> Own Times, iii. 6.

<sup>2</sup> Tatler, No. xiv.

for admirable Reports of his decisions published after his death. These, beginning with Easter Term, 6 W. & M., were compiled by Lord Raymond, who was his pupil, and who became his successor. Many of them are distinguished by animation as well as precision, and they form a delightful treat to the happy few who have a genuine taste for juridical science.

In deciding private rights, Chief Justice Holt's great achievement was, that he moulded the old system which he found established to the new wants of an altered state of society. The rules of the common law had been framed in feudal times, when commerce was nearly unknown and personal property was of little value. Manufactures were now beginning to flourish; there was an increased exchange of commodities with foreign countries; and the English colonies in America were rising into importance. Yet, it having been adjudged in the YEAR-BOOKS that "a chose in action (or debt) cannot be transferred, because livery of seisin cannot be given of it as of land," the negotiability of bills of exchange and of promissory notes (or goldsmiths' notes, as they were called) was in a state of utter confusion, and nobody could tell what were the liabilities or remedies upon them."<sup>1</sup> By a long series of decisions, and by an act of parliament which he suggested, he framed the code by which negotiable securities are regulated nearly as it exists at the present day. He likewise settled several important questions in the law of insurance, although it was reserved for Lord Mansfield to expand and to perfect this important branch of our jurisprudence. From Holt's acquaintance with the writings of the civilians, he most usefully liberalised, defined, and illustrated the general law of contracts in this country.

The most celebrated case which he decided in this department was that of *Coggs v. Bernard*, in which the question arose, "whether, if a person promises without reward to take care of goods, he is answerable if they are lost or damaged by his negligence?" In a short compass he expounded with admirable clearness and accuracy the whole law of *bailment*, or the liability of the person to whom goods are delivered for different purposes on behalf of the owner; availing himself of his knowledge of the Roman civil law, of which most English lawyers were as ignorant as of the Institutes of Menu. Thus he began:—

"There are six sorts of bailments:—First, a mere delivering goods by one man to keep for the use of the owner; and this I call a *depositum*. The second sort is where goods are lent to a friend gratis to be used by him; and this is called *commodatum*, because the thing is to be restored in specie. The third sort is where goods are left with the bailee to be

<sup>1</sup> It was then doubted whether any one could draw, accept, or indorse a bill of exchange except a merchant?—whether notice of the dishonor of a bill was necessary to charge the drawer or indorser?—whether an indorser was liable except on default of the drawer?—whether there was any distinction between foreign and inland bills?—whether interest was recoverable on dishonored bills? and whether a promissory note, payable to order, was transferable by indorsement?

used by him for hire; this is called *locatio et conductio*; the lender is called *locator*, and the borrower *conductor*. The fourth sort is where goods are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*. The fifth sort is where goods are delivered to be carried, or something to be done about them, for a reward to be paid by the person who delivers them to the bailee. The sixth sort is where there is a delivery of goods to some body who is to carry them or do something about them gratis, without any reward for such his carriage or work; which is the present case."

He then elaborately goes over the six sorts of bailment, showing the exact degree of care required on the part of the bailee in each, with the corresponding degree of negligence which will give a right of action to the bailor. In the last he shows that, in consideration of the trust, there is an implied promise to take ordinary care; so that, although there be no reward, for a loss arising from gross negligence the bailee is liable to the bailor for the value of the goods.

Sir William Jones is contented that his own masterly "Essay on the Law of Bailment" shall be considered merely as a commentary upon this judgment; and Professor Story, in his "Commentaries on the Law of Bailments," represents it as "a prodigious effort to arrange the principles by which the subject is regulated in a scientific order."

Holt was the first to lay down the doctrine, which was afterwards fully established in the case of *Somerset* the negro,<sup>1</sup> that the *status* of slavery cannot exist in England, and that as soon as a slave breathes the air of England he is free. The question originally arose before him in Virginia, where slavery was allowed by law; and, an action being brought in the Court of King's Bench for the price, the declaration stated that "the defendant was indebted to the plaintiff in the parish of St. Mary-le-Bow, in the ward of Cheap, in the city of London, for a negro slave *there* sold and delivered,"—allegations of time and place in such proceedings being generally immaterial. But on this occasion, after a verdict for the plaintiff, there was a motion in arrest of judgment because the contract in respect of which the supposed debt arose was illegal. *Holt, C. J.*: "As soon as a negro comes into England he is free; one may be a *villein* in England, but not a slave. The action would have been maintainable if the sale had been alleged to be in Virginia, and that, by the law of the country, slaves are saleable there." *Judgment arrested.*"<sup>2</sup>

Subsequently, an action of trover was brought in the Court of Queen's Bench to recover the value of a negro alleged to be the property of the plaintiff, and to have been unlawfully detained by the defendant. The plaintiff's counsel relied upon a decision of the Court of Common Pleas, "that trover will lie for a negro, because negroes are heathens, and therefore a man may have property in them, and, without averment, notice may be taken judicially that negroes are heathens." But *per*

<sup>1</sup> 20 St. Tr. 23

<sup>2</sup> *Smith v. Brown*, Cases temp. Holt, 405.



*Holt, C. J.* : "Trover does not lie for a black man more than for a white. By the common law no man could have a property in another man, except in special cases, as in a villein, or a captive taken in war ; but in England there is no such thing as a slave, and a human being never was considered a chattel to be sold for a price, and, when wrongfully seized, to have a value put upon him in damages by a jury like an ox or an ass."<sup>1</sup>

He likewise scouted the doctrine about "forestalling and regrating," by which commerce continued to be cramped down to the end of the reign of George III. ; showing that, if acted upon, every man who wished to have a dish of fish must go and buy it at Billingsgate, as it would be unlawful for fishmongers to buy turbot or lobsters there for the purpose of selling them again.<sup>2</sup>

He showed considerable boldness in deciding that under the statute of Elizabeth, subjecting to a penalty all who do not frequent their parish church on Sunday, a man is excused who frequents any other church. *Holt, C. J.* : "Parishes were instituted for the ease and benefit of the people, and not of the parson, that they might have a place certain to repair to when they thought convenient, and a parson from whom they had right to receive instructions ; and if every parishioner is obliged to go to his parish church, then the gentlemen of Gray's Inn and Lincoln's Inn must no longer repair to their respective chapels, but to their parish churches ; otherwise they may be compelled to it by ecclesiastical censures."<sup>3</sup>

He put an end to the practice which had hitherto prevailed in England, and which still prevails in France, of trying to show the probability of persons having committed the offence for which they are tried by giving evidence of former offences of which they are supposed to have been guilty. Thus, on the trial before him of Harrison, for the murder of Dr. Clench, the counsel for the prosecution called a witness to prove some felonious design of the prisoner three years before, the Judge indignantly exclaimed, "Hold, hold ! what are you doing now ? Are you going to arraign his whole life ? How can he defend himself from charges of which he has no notice ? and how many issues are to be raised to perplex me and the jury ? Away, Away ! that ought not to be ; that is nothing to this matter."<sup>4</sup>

He likewise put an end to the revolting practice of trying prisoners in fetters. Hearing a clanking when Cranburne, charged with being implicated in the "Assassination Plot," was brought to the bar to be arraigned, he said, without any complaint having been made to him, "I should like to know why the prisoner is brought in ironed. If fetters were necessary for his safe custody before, there is no danger of escape or rescue here. Let them be instantly knocked off. When prisoners are tried, they should stand at their ease."<sup>5</sup>

<sup>1</sup> 3 Keble, 685. ; 1 Lord Raym. 146. ; 2 Lord Raym. 1275. ; Salk. 666.

<sup>2</sup> 1 Shower, 292.

<sup>3</sup> Britton v. Standish, Cases temp. Holt, 141.

<sup>4</sup> 12 St. Tr. 833-874.

<sup>5</sup> 13 St. Tr. 221.

A still more important improvement in criminal trials, on his suggestion, was introduced by Parliament passing an act which, for the first time, allowed witnesses called for the prisoner to be examined upon oath.<sup>1</sup> Holt's associates in the King's Bench were very respectable men, who had either been removed for their independence by James II., or were selected from the bar for knowledge and good character. They occasionally differed from him, but never factiously combined against him. We have, on the contrary, some remarkable instances of their candor. Thus, in *Regina v. Tutchin*, Powys and Gould having delivered opinions one way, and Powell and Holt the other, the report concludes with this "*Memorandum* : Powys, Justice, recanted *instanter*, and Gould, Justice, *hæsitabat*."<sup>2</sup> At times he was too subtle and profound for them. Of this Lord Raymond gives an instance in language which shows that he had no great veneration for the *puisnies*. After mentioning a decisive objection to an action started by the Chief Justice, he says, "The three judges seemed to be in a surprise, and not, in truth, to comprehend this objection; and, therefore, they persisted in their former opinion, talking of '*agreements*,' '*intent of the party*,' '*binding of the land*,' and I know not what; and so they gave judgment for the plaintiff, against the opinion of Holt, Chief Justice."<sup>3</sup>

We have a remarkable proof of the overwhelming weight which his opinion carried, even when he was wrong. An action being brought against the Postmaster General for the loss of Exchequer bills occasioned by the negligence of an inferior agent in the employment of the Post Office, Holt, by a false analogy between this and actions against the sheriff and other officers who are supposed to do in person the duty the breach of which is complained of, maintained that the Postmaster General was liable. Powys, Gould, and Turton, taking a juster view of the subject, said that, although an action lies against a public officer at the suit of those who suffer a private damage from his default, it must be brought against the person who has violated the law; and that to apply the maxim *respondeat superior* to the head of a great department of the state would be injurious to the individual, and detrimental to the public. So judgment was given for the defendant. But the plaintiff having declared that he would bring a writ of error in the Exchequer Chamber, and, if necessary, to the House of Lords, the Postmaster General was so frightened, and considered it so certain that Holt would be declared to be in the right, that, rather than continue the litigation, he paid the whole of the demand.<sup>4</sup>

One of the most whimsical questions which arose before him he thus settled: "If a man be hung in chains on my land, after the body is consumed, I shall have the gibbet and chain as affixed to the freehold."<sup>5</sup>

<sup>1</sup> 1 Ann, st. 2. c. 9.

<sup>2</sup> 6 Mod. 287.

<sup>3</sup> *Brewster v. Kitchen*, 1 Lord Raym. 322.

<sup>4</sup> *Lowe v. Sir Robert Cotton*, 1 Lord Raym. 646. This strange opinion of Holt was solemnly overruled by the Court of King's Bench in Lord Mansfield's time; the law ever since being considered quite settled in favor of the Post-master General. *Whitefield v. Lord Le Despencer*, Cowp. 754.

<sup>5</sup> 1 Lord Raym. 738. But the French Courts lately decided that a stone fall-

But, as a mere Judge settling civil rights, great as were his merits, he probably would soon have been known only to dull lawyers who search for precedents. It was by his conduct in presiding on the trial of state prosecutions, and in determining questions of constitutional law in which the two Houses of Parliament were parties, that he acquired an immortal reputation.

During the two last preceding Stuart reigns, the administration of criminal justice in cases in which the Crown was concerned had been becoming worse and worse, till at last it reached the utmost verge of infamy. The most powerful justification of the Revolution will be found in the volumes of the State Trials; and I have heard the late Lord Tenterden, a very zealous though enlightened defender of indefeasible hereditary right, declare that "they almost persuaded him to become a Whig." Chief Justices, worse than any before known, were turned out to make place for successors who were still more atrocious. From the proceedings on the trials of Alderman Cornish and of Mrs. Gaunt we may see that, from a course of unblushing violation of the rules framed for the protection of innocence, the judges had lost all sense of decency, and were in the habit of browbeating witnesses, insulting juries, and seeking to crush the accused, without any consciousness of impropriety.

Holt had been Chief Justice little more than a year, when, as a Criminal Judge between the Crown and the subject, his qualities were put to a severe test. Lord Preston, a Scottish nobleman, had engaged in a very formidable conspiracy to dethrone King William and [A. D. 1690.] to restore King James. Had he succeeded, he would have been celebrated in history for his loyalty; and the first consequence would have been, that the ministers and judges now acting under royal authority would have been tried as traitors. According to recent examples, the prisoner, if not attainted by act of parliament without the form of trial, ought, after reading some depositions against him taken in his absence, and the examination of a pretended accomplice, to have been stopped as often as he attempted to speak in his defence; and, upon a verdict of guilty by a packed jury, to have been led off to execution. But this was a new era in our judicial annals. Lord Preston had quite as patient and as fair a trial as any prisoner would have before Lord Denman in the reign of Queen Victoria. He first resolutely insisted that he was not liable to be tried in this fashion, because he was a peer of Scotland. When his plea was properly overruled, he expressed some apprehension that he might have given offence by his pertinacity; but, the Chief Justice mildly observed, "My Lord, nobody blames you, though your Lordship do urge matters that cannot be supported; and we shall take care that they do not tend to your Lordship's prejudice. We consider the condition you are in; you stand at the bar for your life: you shall have all the fair and just dealings that can be; and the Court, as in duty bound, will see that you have no wrong done you." Although a clear case for the Crown was made out by witnesses of un-  
ing from the heavens belongs to the finder and not the owner of the field in which it falls.

doubted credit, and the Chief Justice summed up the evidence with perfect accuracy and fairness, the prisoner repeatedly interrupted him.

*Holt, C. J.* : "Interrupt me as much as you please, if you think I do not observe right; I assure you I will do you no wrong willingly."

*Lord Preston* : "No, my Lord, I see it well enough that your Lordship would not." When the jury were about to retire to consider of their verdict, Lord Preston requested to speak again, although he had been before fully heard. *Holt, C. J.* : "It is contrary to the course of all proceedings to have anything said to the jury after the Court has summed up the evidence: but we will dispense with it: what further have you to say?" *Lord Preston* : "I humbly thank your Lordship; I am not acquainted with such proceedings, but, whatsoever my fate may be, I cannot but own that I have had a fair trial for my life." He was then patiently heard, and he chiefly complained of some harsh treatment he had experienced from the new Government when he wished, as he alleged, to live quietly in the country. *Holt, C. J.* : "Suppose your Lordship did think yourself hardly used, yet your Lordship must remember it was, in a time of danger your Lordship was taken up, and you had showed your dissatisfaction with the present Government; and, therefore, they were not to be blamed if they secured themselves against you." The jury, without hesitation, found a verdict of GUILTY; but, with the entire concurrence of the Chief Justice, the prisoner afterwards received a free pardon.<sup>1</sup>

When Charnock, and the other conspirators engaged in the attempt [A. D. 1696.] upon the life of King William, came to be tried before him, although he was obliged to refuse them a copy of the indictment and the assistance of counsel because the statute to regulate trials for high treason had not come into operation, he conducted the trial with the utmost impartiality and moderation, and in strict conformity to the rules of evidence as we now understand them. At the same time, he answered with firmness the objection that "words cannot amount to treason," marking the distinction whether the *words* have reference to an *act*. *Holt, C. J.* : "Now I must tell you, gentlemen, it is true in some cases that words, however seditious, are not treason; for such words loosely spoken, without relation to any act or design, are only a misdemeanor. But arguments, and words of persuasion, to engage in a design on the King's life, and directing or proposing the best way for effecting it, are overt acts of high treason. If two agree together to kill the King, though the agreement be verbal only, they are guilty of this offence; consulting together for such a purpose, though there is nothing reduced to writing, and nothing done upon it, is an overt act of high treason."<sup>2</sup> The prisoners were very justly found guilty, and executed.

<sup>1</sup> 12 St. Tr. 646-822.

<sup>2</sup> 12 St. Tr. 1451. Afterwards on the trial of Sir William Parkyns, concerned in the same plot, Holt in commenting on the treasonable consult, observed,— "But," says Sir William Parkyns, "this is only words, and words are not treason, they are words that relate to acts, and if you believe that they were spoken



Before Ambrose Rookwood, implicated in the same conspiracy, could be brought to trial, the statute for regulating trials for high treason had come into operation; and Sir Bartholomew Shower, being assigned as counsel for him, was making some apologies for the boldness of the line of defence adopted. *Holt, C. J.*: "Never make apologies, Sir Bartholomew, for it is as lawful for you to be of counsel in this case as it is in any other case in which the law allows counsel. It is expected you should do your best for those you are assigned to defend against the charge of high treason (though for attempting the King's life,) as it is expected in any other case that you do your duty to your client."<sup>1</sup> He summed up, however, with energy, taking care, as he always properly did, to assist the jury in coming to a right conclusion. Thus he began:—"The prisoner is indicted for high treason in designing and compassing the death of the King, which was to be effected by an assassination in the most barbarous and wicked manner, being to surprise the King and murder him in his coach. The question, gentlemen, is, whether this prisoner be guilty of the crime, or no?"<sup>2</sup>

Holt's conduct, in presiding at these trials, was applauded even by the Tories. But a charge was brought against him, by Ralph, of straining the law of high treason to please the Government in the case of Sir John Friend.<sup>3</sup> The bigoted historian, having bitterly censured the conviction, says, with affected candor, "The Lord Chief Justice Holt, who presided on this occasion, has in general the character of an upright judge; but almost all lawyers have narrow minds, and, by the whole drift of their studies, find themselves biassed to adhere to the King against the prisoners." The direction given to the jury on this occasion, when examined, will be found quite unexceptionable. The prisoner was indicted for compassing the King's death, and was clearly proved to have had the design of dethroning him. An overt act relied upon was, despatching a deputy to France to invite the French King to send over an army to assist those confederated against the Government. Having summed up the evidence, the Chief Justice said:—

"Now, Sir John Friend insists, as a matter of law, that as the statute of Edward III. makes two treasons, one compassing the death of the King, and another the levying of war; and as war was not actually levied in this case, a bare conspiracy or design to levy war does not come within this law against treason. For that, I must tell you, gentlemen, that if there be only a conspiracy to levy war, it is not treason; but if the design be either to kill the King, or depose him, or imprison him, or put any force or restraint upon him, and the way or method of effecting the object is by levying war, then the conspiracy to levy war for that purpose is high treason, though no war be levied; for such conspiracy is an overt act, proving the compassing the death of the King. If a man designs the death, deposition, or destruction of the King, and, to effect

they amount to treason."—13 St. Tr. 132. These passages, if cited, might have considerably shortened certain debates in the House of Commons in the session of 1848, on the "Bill for the Protection of the Crown and Government."

<sup>1</sup> 13 St. Tr. 154.<sup>2</sup> *Ib.* 263.<sup>3</sup> *Ib.* 1.

the design, agrees and consults to levy war,—that this should not be high treason, nor war being actually levied, is a very strange doctrine, and the contrary has always been held to be law. There may be war levied without any design upon the King's person or endangering of it, which, if actually levied, is high treason; but a bare design to levy war, without more, does not amount to that offence."

This distinction is fully justified by prior authorities, and has ever since been adhered to. Erskine, in his celebrated defence of Hardy, actually cites this very passage with applause,—saying, "If I had any thing at stake short of the life of the prisoner, I might sit down as soon as I have read it; for if one did not know it to be an extract from an ancient trial, one would say it was admirably and accurately written for the present purpose."<sup>1</sup>

Without meaning any reflection upon Holt, who always maintained his character as a good Whig, I must mention his doctrine respecting the liberty of the press, which shows that, in the second reign after the Revolution, the legal right of political discussion had not yet been acquired. If this doctrine were now acted upon, the "Government Journal," which supports, through thick and thin, all the measures of the administration for the time being, would have a monopoly, and there is hardly a newspaper published in the United Kingdom which might not be prosecuted as libellous. On the trial of the printer of the [A. D. 1704.] OBSERVATOR for an article abusing Queen Anne's ministers pretty freely, but in language which we should consider very innocent, the defendant's counsel having attempted to justify it, Holt, C. J., observed: "I am surprised to be told that a writing is not a libel which reflects upon the government, and endeavors to possess the people with the notion that the government is administered by corrupt persons. If writers should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. You are to consider whether the words which I have read to you do not tend to beget an ill opinion of the administration of the government. Their purport is, that 'those who are employed know nothing of the matter, and those who do know are not employed; that men are not adapted to offices, but offices to men, out of particular regard to their interest and not to their fitness.'" The defendant was accordingly found guilty.<sup>2</sup>

<sup>1</sup> 13 St. Tr. 1-64. The late statute, 11 Vict. c. 12., will probably for ever put an end to such questions, as we shall henceforth have no trial for high treason unless where there has been an actual design against the person of the sovereign, or an actual levying of war, or an actual adhering to the King's enemies. Conspiracies to bring about a revolution in the government, or to levy war, will henceforth be prosecuted as felonies. This appears to me to be a great improvement in our criminal code. The construction put upon the statute of Edward III., that a conspiracy to levy war was an overt act, to prove a compassing of the King's death was very strained and far-fetched. Different offences against the state are now properly discriminated, and between treason and misdemeanor an intermediate class is established, with easy means of prosecution and an appropriate punishment. The conviction of *Mitchell* upon this statute has proved its efficacy. (May 29, 1848.)

<sup>2</sup> 14 St. Tr. 1128. But although such was considered the letter of the law,

## CHAPTER XXIV.

CONTINUATION OF THE LIFE OF LORD CHIEF JUSTICE HOLT TILL THE  
TERMINATION OF HIS CONTESTS WITH THE TWO HOUSES OF PARLIA-  
MENT.

I NOW come to Holt's contests with the two Houses of Parliament, from which his popularity has principally arisen. The first was with the House of Lords, and throughout the whole of it he conducted himself most laudably—strictly confining himself within the jurisdiction of his court; and, while he nobly vindicated his own independence, never seeking an opportunity for display or wantonly hazarding a collision between rival authorities.

An indictment for murder having been found against Charles Knowllys, Esqr., and removed by *certiorari* into the Court of King's Bench, he pleaded in abatement "that he was a [A. D. 1694.] peer of the realm, and ought to be tried by his peers, being, as of right, Earl of Banbury, and lineally descended from William Knowllys, created Earl of Banbury by King Charles II." The replication stated, "That the prisoner had presented a petition to the Lords spiritual and temporal, praying that he might be tried by them on this charge, and that parliament had thereupon, *secundum legem et consuetudinem*, resolved that he had no right to the Earldom of Banbury." There was a demurrer to the replication, and the Lords very absurdly were much offended that the Court of King's Bench did not instantly, in conformity to this resolution, overrule the plea. But, after solemn argument, Holt gave judgment that the plea was good, and the replication bad—mainly upon the ground that this could not be considered *res judicata*—as the Lords had no authority to decide a question of peerage except on a reference from the Crown, and, therefore, that their resolution respecting the Earldom of Banbury was a proceeding *coram non judice* and a nullity. Having clearly shown that the Lords had no original jurisdiction on the subject, and that the question of the prisoner's right to be tried as a peer had never been judicially brought before them, he observed,—

"I admit that the House of Peers has jurisdiction over its own members, and is a supreme court; but it is the law which has vested them with such ample authority, and therefore it is no diminution to their power to say that they ought to observe the limits prescribed for them

the periodical press was much less decorous than at the present day, and the private life of public men was then mercilessly exposed and traduced. Any one now writing of political opponents as Swift did of Somers and Cowper, with whom he had been on terms of intimate friendship, would be expelled from society.

by this law, which, in other respects, hath made them so great. As to the averment in the replication that the judgment was '*secundum legem et consuetudinem parliamenti*,' I know no reason for its introduction by the King's counsel unless they thought to frighten the Judges : but I regard it not ; for though I have great respect and deference for the Houses of Parliament, yet I sit here to administer justice according to the law of the land, and the oath I have sworn. Inheritances are to be determined not by the custom of parliament, but by the common law of England, which is the birthright of every Englishman. Custom ought to consist in usage, and I desire to see the precedent of such judgments. No precedent hath been alleged to warrant the determining inheritances originally *per legem parliamenti*. If inheritances were determinable by the Lords without their having jurisdiction, they would have uncontrollable power, and '*res est misera, ubi jus est vagum*.' "

So judgment was given in favor of the plea in abatement, and the prisoner was discharged without being tried.

It is quite clear that Holt had not in the slightest degree encroached on the privileges of the House of Lords. His court had jurisdiction of the murder only upon the supposition that the party accused was a commoner, and, unless a sufficient answer was given to the plea that he was a peer, its jurisdiction was gone. The resolution of the Lords on his petition, being a proceeding *coram non judice*, was no answer at all, and the trial before the King's Bench therefore could not possibly go on.

Knowllys, when set at liberty, still assumed the title of Earl of Banbury, and two or three years afterwards, he petitioned the Crown for a writ of summons that he might take his seat as a peer. This was regularly referred to the House of Lords, who found themselves in a great puzzle ; for, although they now clearly had jurisdiction to examine and decide upon the claim, they were unwilling to confess that their former determination was invalid. They very foolishly resolved to wreak their [FEB. 5, 1697-8.] vengeance upon Lord Chief Justice Holt, and they made an order that he should attend the Committee of Privileges appointed to consider the claim. He attended accordingly, when the Chairman of the Committee thus addressed him :—

" My Lord Chief Justice Holt : Their Lordships have perused the record of the Court of King's Bench relating to the trial of the person who calls himself Earl of Banbury for murder, from which it appears that the Court of King's Bench thought fit to quash the indictment against the said person there called Charles Knowllys, Esq., although the House of Lords had determined that he had no right to the title of Earl of Banbury. You are now desired to give their Lordships an account why that Court whereof you are Chief Justice hath done so." *Holt, C. J.* : " I acknowledge the thing. I gave the judgment, and I gave it according to my conscience. We are trusted with the law ; we are to be protected and not arraigned ; we are not to give the reasons for our judgment in this fashion, and therefore I desire to be excused giving any."

He was directed to withdraw, and, after some deliberation among the



members of the Committee, he was called in again, and asked with much solemnity "if he persisted in the answer he had given."

*Holt, C. J.* : "The record shows the judgment I gave. It would be submitting to an arraignment for having given judgment according to law, if I should give any reasons here. I gave my reasons in another place at large. If your Lordships report this my refusal to the House, I should be glad to know when you do so, that I may then desire to be heard in point of law. The judgment is questionable in a proper method by writ of error; but I am not to be thus questioned. I am not in any way to be arraigned for what I do judicially. The judgment may be arraigned in a proper manner, and then, being asked, I will state to your Lordships the reasons on which it rests. I might answer if I would, but I think it safest to keep myself under the protection the law has given me. I look upon this as an arraignment; I insist upon it, if I am arraigned, I ought not to answer."

The Committee having reported these proceedings to the House, a resolution was passed "to hear the Lord Chief Justice as to this point, whether he did right in refusing to give [A. D. 1698.] account to the Committee of his reasons for his judgment in the King's Bench, in relation to quashing the indictment for murder against a person who claimed to be Earl of Banbury." Lord Chief Justice Holt attending, and being called on, the Lord Keeper said to him :—

"You are required to give an account why you refused to answer the questions put to you by a committee of this House. You expressed a wish to be heard when the report was made, and their Lordships have now sent for you to know the reasons why you did not think fit to communicate to the committee the reasons for your judgment." *Holt, C. J.* : "My Lords, I have only respectfully to adhere to what I addressed to the committee, which has been truly reported to your Lordships' House. Your Lordships constitute the highest court known in this kingdom before which all judgments may be brought; and your Lordships may affirm or reverse them as seems you good. I and my brother judges, according to immemorial usage, have a summons to attend in this House *ad consulendum*. Your Lordships have an undoubted right to ask our opinion, with our reasons, on any question of law which comes judicially before you. If a writ of error should be brought before your Lordships in *Rex v. Knowllys*, and your Lordships ask my opinion upon it, I will most willingly render the reasons which induced me, according to my conscience, to give judgment for the prisoner. But I never heard of any such thing demanded of any judge as that, where there is no writ of error depending, he should be required to give reasons for his judgment. I did think myself not bound by law to answer the questions put to me. What a judge does honestly in open court, he is not to be arraigned for."

A debate ensued, and directions were given to the Lord Keeper to inform him "that the questions asked him by the Committee were not intended to accuse."

In truth, this was abandoning the only ground that could be taken for urging the questions. If there had been any suspicion of corruption,

the House, in the exercise of its inquisitorial powers, might have taken cognizance of the matter, and, perhaps, examined a party accused; but, in the absence of all notion of improper motive, it was quite plain that a judge could not be interrogated respecting the reasons for a judgment not appealed from. Under such circumstances, the answers could only be to gratify impertinent curiosity. Holt must have been aware of the advantage he had, but he contented himself with saying, "Besides the danger of accusing myself, I have other good and sufficient reasons for declining to answer the questions propounded to me."

The hour of dinner had arrived, which has always been enough to stop important proceedings in their Lordships' house. The debate was therefore adjourned till the following Monday, at which time the Chief Justice was again ordered to attend. In the meanwhile their Lordships came to their senses, and found that they had got into a very foolish scrape. The only step they could now take to assert their authority was, to commit the Chief Justice to prison; and, although I do not exactly know what legal remedy in that case he would have had, the probability is that, practically, he would have been released by a general rising of the population of London,—the struggle not adding much to the credit or authority of their Lordships. The House, therefore, by an adjournment, prudently avoided meeting on the day appointed, whereby the order dropped, and it never was renewed. The public had strongly taken the side of the Chief Justice, and his health was given with enthusiasm at all public meetings throughout the kingdom.<sup>1</sup>

He most cautiously abstained from mixing in party politics. Not even in private conversation would he offer an opinion on the question of the Spanish Succession, and he was entirely ignorant of the negotiation of the Partition Treaties. He remained always on courteous terms with Lord Somers, but there never was much familiarity between them. In the famous "Bankers' Case," which was factiously agitated by many, he, [A. D. 1697–1700.] from a sense of duty, gave a judgment which was highly agreeable to the Tories—Charles II., having made grants by way of annuity out of the hereditary revenues of the Crown, as a compensation to those who had been defrauded by the shutting up of the Exchequer during the CABAL administration, the [A. D. 1700.] question was whether these grants were binding on King William III.? In the Exchequer Chamber, Holt supported the claim, on principles which we are rather surprised to find propounded by a Whig since the Revolution:—

"It is objected," said he, "that this power in the King, of alienating his revenue, may be a prejudice to his people, to whom he must recur continually for supplies. I answer that the law has not such dishonorable thoughts of the King as to imagine he will do anything amiss to his people in those things in which he hath power so to do. But that which I insist on is, that it is absurd in its nature to restrain the King from a power of alienating his revenues, of which he is seised in fee. It is

<sup>1</sup> 12 St. Tr. 1167–1207.; 1 Lord Raym. 10.; Carth. 297.: Salk, 509; Lord Campbell's Speeches, 326.

against the nature of the being of a king that he should have less power than his people. Suppose that before his accession the King was seised of lands, the crown descending upon him, he would be seised *jure coronæ*; —and shall he then have less power over those very lands than he had when a private person? Shall he now be disabled to alien by being a king? This would be against a well-known maxim, that the descent of the crown takes away all disability. Then it is repugnant to the constitution of the government. Suppose the King should be under a sudden danger of being invaded: if he could not raise money by alienating his revenue, the nation might perish; for he could not otherwise raise money than by an act of parliament, for which there might not be time. And there ought to be a power in all governments to reward persons that deserve well, for rewards and punishments are the supporters of all governments; and it has been the constant usage of the kings of England to reward persons deserving of the government out of the crown revenues by pensions, and giving estates to support the titles of Earl and other dignities. Some may say they do not deny the King may alienate his own demesnes or any lands that come to him by descent or purchase, but this revenue was settled by act of parliament on the crown, and therefore it cannot be alienated. I do not find any such distinction in our law books, nor any authority in the common statute law that restrains the kings of England from alienating any sort of their revenues. What reason can be given why some estates should be alienable and others not? If an estate be settled on a subject by act of parliament, he may unquestionably alienate it; and why shall not the King have the same privilege? He has always done it. All the abbey lands were given to the King by act of parliament in general terms as here, and he has alienated the whole of them. So the Customs have been always granted away and charged by the King, although they were given to him by act of parliament. Here there was a consideration for the grant in the debt due from the crown to the grantees."

He was likewise of opinion that the Bankers had a remedy against the King by petition, or *monstrans de droit*.<sup>1</sup> This opinion was then overruled,—Lord Somers, who held the great seal, taking [JAN. 23.] the opposite side;—but a writ of error was brought in the House of Lords, and there a Tory majority reversed the judgment of the Exchequer Chamber.

A motion was soon after made in the House of Commons for the removal of Lord Somers, and, although this was negatived, [APRIL 10.] the King found that he could no longer go on with a Whig administration, and he took the great seal from Lord Somers, who had refused voluntarily to resign it.

King William considered that Holt was by far the fittest man to succeed to it; and, suspecting that his opinion in the Bankers' Case had been influenced by a wish for still higher elevation, sent for him to

<sup>1</sup> 14 St. Tr. 30. So the law then stood. The wonder is to find it so defended. In the succeeding reign the power of alienation was put an end to by the legislature.

Hampton Court, and, showing him the "bauble," offered immediately to deliver it into his hand, with the title of Lord Chancellor, a peerage being to follow. What must have been the royal astonishment when Holt pronounced these memorable words,—“I feel highly honored by your Majesty's gracious offer; but all the time I was at the bar I never had more than one cause in Chancery, and *that* I lost, so that I cannot think myself qualified for so great a trust.”<sup>1</sup> The King in vain attempted to shake his resolution, which was perhaps strengthened by the reflection that the tenure of the office he already held was far more secure, as there seemed little probability of any administration being formed which could last many weeks. All that Holt could be induced to promise at this interview was, that if there should be a necessity for putting the great seal into commission for a short time, he would act as one of the Lords Commissioners. Trevor, the Attorney General, and others on whom it was pressed, having likewise refused it, a commission became necessary, [A. D. 1700.] and it was delivered to the joint keeping of Lord Chief Justice Holt, Lord Chief Justice Treby, and Lord Chief Baron Ward.

These Lords Commissioners held it nearly a month; but this was chiefly in the Vacation between Easter Term and Trinity Term, and we have no report of any of their decisions. Holt was probably surprised [MAY 21. to find that he got on so well as an Equity Judge, but he felt no regret in transferring the great seal to Sir Nathan Wright, and returning to that court where he was sure both to decide properly and to decide with applause.

Nothing else very memorable occurred to Holt during the reign of William III. There seemed a probability of his being placed in a difficult and delicate position, as adviser to the Peers, upon the impeachment of Lord Somers; but he was relieved from this embarrassment by the quarrel between the two Houses, which put a sudden end to the trial.

It is a curious fact that our “Deliverer,” although professing such a regard for liberty, actually *vetoed* a bill passed by the two Houses of Parliament to appoint the Judges *quamdiu se bene gesserint*, and still insisted on their holding during pleasure as long as he himself should rule, although he agreed to a clause in the “Act of Settlement,” providing, that after the limitation of the crown, thereby introduced, should take effect, they should only be removable on the address of the two Houses of Parliament.<sup>2</sup> It may add to our admiration of Holt's independent conduct on the bench, that he might have forfeited his office by displeasing the Government; but as the arbitrary dismissal of Common Law judges had been one of the loudest complaints against James II., the actual peril that a Revolution judge ran must have been very inconsiderable.

On the accession of Queen Anne, Holt was immediately reappointed, [MARCH 8, 1702.] and under her he continued Chief Justice of England for eight years longer, with unabated energy and still increasing reputation.

<sup>1</sup> Granger, i. 164.; Cole's Memoirs, p. 128.

<sup>2</sup> 12 & 13 W. III. c. 2.



The two Houses of Parliament were soon in an unprecedented state of antagonism to each other. From the appointment of Whig bishops, from the elevation of some good Whigs to the peerage, and, I must add, from the superior intelligence which then distinguished the high aristocracy of England,—among the Lords there was a decided majority who supported Whig principles. But Anne's first House of Commons was filled with men of whom Addison's "Tory Fox Hunter" and Fielding's "Squire Western" might be considered fair types,—ignorant, bigoted, and factious,—professing a love for Church and Queen, but mostly Jacobites in their hearts,—and, although only secretly drinking to "the King over the water," openly professing an abhorrence of Dissenters, among whom they classed all men of tolerant religious feelings. Their grand scheme was to perpetuate their power by disqualifying all who did not take the sacrament according to the rites of the Church of England from being either electors or representatives, and by deciding on every controverted election in favor of their own partisans. In consequence, Tory candidates with only a small minority of real electors their favor by making corrupt bargains with returning officers, were sent to parliament; and petitions to the House of Commons, complaining of these abuses, were found wholly unavailing.

Under these circumstances began the contest about parliamentary privileges which has rendered the name of Holt so illustrious. In the course of it he committed some errors, and his zeal was sometimes that of an advocate eager for victory, rather than of a magistrate one, desirous of justice; but on the whole he showed great discrimination as well as intrepidity, and deservedly earned the glory which he acquired.

One of the most corrupt returns was by the Bailiffs of Aylesbury and The defeated candidates, who had a considerable majority of legal votes, being Whigs, knew that it would be in vain to petition the House of Commons, and it was resolved that several of the electors whose votes had been rejected should respectively bring actions, in the Court of Queen's Bench, against the returning officers. In the first of these, one *Ashby* was the plaintiff, and he, clearly making out his case before a jury, recovered a verdict with large damages. The defendants then moved in arrest of judgment, on the ground that, although the facts alleged by the plaintiff were true, an action at law could not be maintained by him, and that the only remedy was by petition to the House of Commons.

The three Puisne Judges associated with Holt were respectable men, but they labored under a suspicion of being Toryishly inclined; and, being rather of timid minds, they were alarmed by a species of action which had not been brought hitherto, although the principles on which it rested was as old as the law itself; and they severally gave opinions in favor of the defendants,—assigning very weak and inconsistent reasons. Holt, of a bold and masculine understanding, as well as a deep lawyer, saw that, a private injury being sustained from breach of duty in a public officer, compensation ought to be given by legal process; and I make no doubt that his indignation was exalted by the thought that

he was now resisting an attempt to deprive the subject of legal redress against a corrupt and arbitrary system of government established by a faction in the House of Commons. Knowing that he was to be overruled in his own court, thus, in a noble strain of judicial eloquence, he poured forth arguments and authorities which he hoped might prevail in a superior tribunal, and which he was sure would justify him to his country:—

*Holt, C. J.*: “The single question is, whether if a free burgess of a corporation, having an undoubted right to give his vote in the election of a representative of the borough in parliament, be maliciously hindered from giving it by the returning officer, he may maintain an action against the returning officer for the injury he has suffered? I am of opinion that judgment ought to be given for the plaintiff. My brothers differ from me in opinion, and they all differ from one another in the reasons for the opinion they have expressed. My brother Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys indeed says he is no judge; but *quasi* a judge; while my brother Powell thinks that the defendant is neither a judge nor anything like a judge, but only an officer to execute the precept, to give notice to the electors of the time and place of election, to assemble them together in order to elect, to cast up the poll, and to declare which candidate has a majority. First, I will maintain that the plaintiff has a right to give his vote. Secondly, that being wrongfully hindered in the enjoyment of that right, the law gives him this action for redress:—From what my brothers have said, I find that I must begin to prove that the plaintiff had a *right* to vote. It is not to be doubted that the Commons of England form a part of the government, and have a share in the legislature, without whom no law passes; but, because of their numbers, this power is not exercisable by them in their proper persons, and therefore by the constitution of England it is to be exercised by representatives chosen by and out of themselves, who have the whole power of all the Commons of England vested in them. Knights of the shire, citizens of cities, burgesses of boroughs, duly elected, form the Commons’ House of Parliament.” After entering at great length into the history of the representation of counties, cities, and boroughs, he continues: “Hence it appears that every man that is to give his vote in the election of members to serve in parliament has a several and particular right in his private capacity as a freeholder, citizen, or burgess. And, surely, it cannot be said that this is so inconsiderable a right as to apply that maxim to it, *de minimis non curat lex*. A right that a man hath to give his vote at the election of a person to represent him in Parliament, there to concur in the making of laws which are to bind his liberty and his property, is of a transcendent nature, and its value is set forth in many statutes. Thus 34 & 35 H. VIII. c. 13., giving Members of Parliament for the first time to Cheshire, says that, ‘for want thereof, the inhabitants have sustained manifold dishonors, losses, and damages, as well in their lands, goods, and bodies, as in the civil and politic governance of the commonwealth of their said county.’ Here, therefore, is a *right*. 2. If the plaintiff has a right,

he must of necessity have means of vindication if he is injured in the exercise or enjoyment of it. Right and remedy, want of right and want of remedy, are reciprocal. It would look very strange, when the commons of England are so fond of sending representatives to parliament, that it should be in the power of a sheriff or other returning officer to deprive them of such right, and yet that they should have no redress; this would be a thing to be admired at by all mankind. My brother Powell, indeed, thinks that an action on the case is not maintainable because here is no hurt or damage to the plaintiff: but, surely, every injury imports a damage; a damage is not merely pecuniary; and injury imports a damage when a man is thereby hindered of his right. For slanderous words, though a man does not lose a penny by the speaking of them, yet he shall have an action, because the right to his fair fame is injured. So, if a man receives a slight cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. It is no objection to say this leads to multiplicity of actions; for if men will multiply injuries, actions must be multiplied too. Every man injured ought to have his recompense. But, says my brother Powys, 'we cannot judge of this matter, because it is a parliamentary thing.' O! by all means be very tender of that! But this matter never can come in question in parliament, and there the plaintiff could receive no compensation for the wrong he has suffered. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be partial at all elections, which is, indeed, a great and a growing mischief, and tends to the prejudice of the peace of the nation. I agree we ought not to enlarge our jurisdiction; by so doing, we usurp both on the right of the Queen and the people. But this is a matter of property determinable before us, and we are bound by our oaths to judge of it. Was ever such a petition heard of in parliament as that a man was hindered of giving his vote and praying them to give him remedy? The Parliament undoubtedly would say, 'take your remedy at law.' It is not like the case of determining the merits of the return between the candidates. This privilege of voting does not differ from any other franchise whatsoever. We do not deny to the House of Commons their jurisdiction to determine elections; but we must not be frightened, when a matter of property comes before us, by saying, 'it belongs to the Parliament.' The Parliament cannot judge of this injury, nor give the plaintiff damages for it. If a returning officer corruptly refuses a vote, and is sued before me, I will direct the jury to make him pay well for it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make. This privilege, belonging to the plaintiff, has been wantonly violated by the defendant; and I am of opinion that, instead of arresting the judgment, we ought to allow the plaintiff to have execution for the damages which the jury has awarded to him."

Judgment, however, was arrested, and such a triumph was this considered to the Tory party, that it was celebrated by bonfires all over the

country. But the writ of errors was brought into the House of Lords, where the Whigs had the ascendancy.

At the hearing the Judges were called in, and nine attended. Holt adhered to his opinion, and was supported by Barons Bury and Smith, while Justices Trevor and Price agreed with the three Puisnies of the Queen's Bench. Lord Somers, now an ex-Chancellor, ably expounded the law, and enforced the arguments in favor of a reversal of the judgment; while Lord Keeper Wright, his successor, not being a peer, was condemned to silence. But little weight was given to reasoning or eloquence. It was made a mere party question, and, on a division, the judgment of the Court of Queen's Bench was reversed by a majority of 50 to 16.

The Whigs were at this time very unpopular, and the decision was viewed with no favor by the public. It threw the House of Commons into a transport of fury, and after a long debate they resolved, by a majority of 215 to 97, "That the qualification of an elector is not cognizable elsewhere than before the Commons of England in parliament assembled: that Ashby, having commenced an action against the Bailiffs of Aylesbury for rejecting his vote, is guilty of a breach of the privileges of this House, and that whosoever shall in future commence such an action, and all attorneys or councillors soliciting or pleading the same, are guilty of a breach of the privileges of this House, for which they may expect condign punishment."

The conduct of the Commons upon this occasion cannot be too severely reprobated. They wantonly rushed into a controversy with the Courts of Law and with the upper House of Parliament. The action brought against the returning officer did not in the slightest degree interfere with any of their functions or any of their privileges; and the House of Lords, in reversing the judgment of the Queen's Bench, had done no more than their duty, in soundly expounding the law, and administering justice to a suitor at their bar. The intemperate resolutions passed had a strong tendency to bring parliamentary privileges into public odium, and to invite dangerous attacks upon it. They were prompted, not by any respect for freedom, but by the desire to perpetuate the power of a faction.

The Lords perhaps would have done well if they had treated this foolish proceeding with silent contempt; but they appointed a committee, who reported that "the Commons thereby assumed a power to control the law and to pervert justice." A sudden prorogation of Parliament suspended the controversy.

During the recess, the current of popular opinion turned strongly against the House of Commons; and various constituencies announced their determination, upon a dissolution of Parliament, to return Whig representatives, who might rescind the obnoxious resolutions. Encouraged by this spirit, *Paty*, and several other electors of Aylesbury, whose votes had been illegally rejected like Ashby's, brought fresh actions against the returning officer.

As soon as Parliament again met, these plaintiffs were all committed



to Newgate, "being guilty of commencing and prosecuting actions at law for not allowing their votes in the election of [Nov. 4.] members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House." The captives having sued out writs of *habeas corpus* in the Queen's Bench, the keeper of the gaol produced them, and made a written return, setting out at full length the above warrant, under which they were arrested and detained. They then moved that they might be set at liberty, on the ground that their imprisonment was unlawful, as the warrant showed that they had been unlawfully committed for bringing actions which the highest tribunal of the country had decided to be competent. On account of the high importance of the question, a meeting was called of the twelve Judges, to whom it was submitted, and eleven of them properly held that no court of law could inquire into the merits of a commitment by either House of Parliament, for the same point had been solemnly decided in Lord Shaftesbury's case; and it is clear that the contrary doctrine subjects all parliamentary privilege to the control of the Common Law judges, who are supposed to be unacquainted with the subject. Holt, C. J., however, refused to acquiesce in this opinion, and was for setting the prisoners at liberty:—

"The legality of the commitment," said he, "depends upon the vote recited in the warrant; and, for my part, I must declare my opinion to be, that the commitment is illegal, although sorry to go contrary to an act of the House of Commons and the opinion of all the rest of the Judges of England. This is not such an imprisonment as the freemen of England ought to submit to. The prisoners have done that which was legal according to the highest tribunal of the country, and which the House of Commons alone could not make illegal. Both Houses jointly cannot alter the law so as to affect the liberty or property of the subject; for this purpose, the Queen must join. The necessity for the concurrence of the three branches of the legislature constitutes the excellence of our constitution. How can the bringing of an action at law for not allowing a vote in the election of members of parliament be a breach of privilege? The returning officer of a borough is not a servant of the House of Commons, is not acting by their authority, and cannot be clothed with any privilege by them. To bring an action against a person who has no privilege, cannot be a breach of privilege, whether the action is maintainable or not. If a peer be charged with any false and scandalous matter, yet if it be by way of action he cannot have *scandalum magnatum*. But the plaintiffs here have a good cause of action, as we know by the judgment in *Ashby v. White*. The declaration of the House of Commons will not make that a breach of privilege which was none before. The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law. We all know that the members of the House of Commons have no protection from arrest in cases of treason, felony, or breaches of the peace; and if they declare they have privileges which they have no legal claim to, the people of England will not be estopped by that de-

claration. This privilege of theirs concerns the liberty of the people in a high degree, by subjecting them to imprisonment for that which heretofore has been lawful, and which cannot be made unlawful without an act of parliament. As to the House of Commons being judges of their own privileges, I say they are so when a question of privilege comes before them. The Judges have been cautious in giving an answer in Parliament in matter of privilege of Parliament. But when such matter arises before them in Westminster Hall, they must determine it. Suppose the actions had proceeded, and the privilege had been pleaded as a defence, we must have given judgment whether it exists or not. Why are we not to adjudge on the return to the *habeas corpus*? The matter appears on the record as well this way as if it were pleaded to an action. We must take notice of the *lex parliamenti*, which is part of the law of the land. As to what my Lord Coke says, that the *lex parliamenti est a multis ignorata*, that is, because they will not apply themselves to understand it. If the votes of both Houses cannot make law, by parity of reason they cannot declare it. The judgment in *Ashby v. White* proves that such an action is no breach of the privileges of the Commons. Why did they not commit him when he brought the action? The suffering of him to go on with his action, is a proof that this pretence of privilege is a new thing. These men have followed his steps, and yet they are said to have acted in breach of the privileges of the Commons. The Commons may commit for a crime: but not without charging that a crime has been perpetrated. Lord Shaftesbury was committed for a contempt done in the House. Here the cause of the commitment being expressed in the warrant, we are precluded from presuming that it was for something criminal of which the Commons could take notice. I am therefore of opinion that the prisoners ought to be set at liberty."

This doctrine seems plausible as well as bold, but, when examined, will be found contrary both to sound reason and to authority; for if the sufficiency of the cause of commitment by either House of Parliament can be examined on a return to a *habeas corpus*, then all parliamentary privilege would be determinable without appeal by every court, and by every single judge, in whom the power of granting a writ of *habeas corpus* is vested; and the two Houses of Parliament, deprived of the power of commitment for a contempt, which belongs to inferior tribunals, could not effectually exercise the functions assigned to them by the constitution. There must be a possibility of the abuse of power wherever it is given without appeal, and in certain cases it must be so given under every form of government. One of these is the power of a supreme legislature, or any branch of it, to judge of its own privileges.

According to the opinion of the eleven Judges, Paty and the other prisoners were remanded on the ground that "the cause of their commitment was not within the jurisdiction of the Court of Queen's Bench."<sup>1</sup>

<sup>1</sup> 2 Lord Raym. 1116. This decision has been acquiesced in ever since. Recently, some Judges have held out a threat that if the cause of commitment expressed in the warrant appears to them not to amount properly to a breach of

Encouraged, however, by the opinion of Holt, and anticipating a favorable consideration from the rival branch of the legislature, *Paty*, and the other Aylesbury men, when recommitted to Newgate, resorted to the attempt of bringing a writ of error to the House of Lords on the decision of the Court of Queen's Bench. No such writ of error had ever been before brought, and the proceeding involved the most serious consequences. Sir Nathan Wright, who was then Lord Keeper of the Great Seal, summoned a meeting of the twelve Judges to advise him whether *ex debito justitiæ* the writ should issue?

Although there was no precedent for such a proceeding, Holt eagerly supported it, and, without giving any decided opinion that the judgment of the Queen's Bench could thus be reviewed, he said that "at all events the writ ought to issue, and that the House of Lords would decide whether they had jurisdiction or not." In this opinion he at last induced all the Judges except one to concur.

The Commons were in a fury. They immediately made out warrants of commitment against the counsel in support of the application, two of whom were lodged in Newgate. The third made his escape from the Serjeant-at-arms by letting himself down from a high window in the Temple with the assistance of a rope and his bed-clothes. Some violent Tory members even intimated a determination to move the commitment of Holt the Chief Justice himself, whom they considered the mortal enemy of their privileges. Nay, the following narrative is actually to be found in various books of anecdotes, it having been copied, without inquiry, from one into another:—

"The Serjeant-at-arms of the Commons presented himself before Chief Justice Holt sitting on his tribunal, and summoned him to appear at the bar of the House to purge himself of his share of the contempt. That the resolute defender of the laws said, with a voice of authority, 'Begone!' Soon after came the Speaker in his robes and full-bottom wig, attended by many high privilege members, and said, 'Sir John Holt, Knight, Chief Justice of her Majesty's Court of Queen's Bench, in the name of the Commons of England, and by their authority, I summon you forthwith to appear at the bar of the House to answer the charge there to be brought against you for divers contempts by you committed in derogation of their ancient and undoubted privileges.' His Lordship calmly replied to him in these remarkable words: "Go back to your chair, Mr. Speaker, within these five minutes, or you may depend upon it I will lay you by the heels in Newgate. You speak of your authority, but I tell you that I sit here as an interpreter of the laws and a distributor of justice, and if the whole House of Commons were in your belly I would not stir one foot.' The Speaker, quailing under this rebuke,

parliamentary privilege they would discharge the prisoner; but such an attempt at usurpation is effectually guarded against by the practice which I had the honor to introduce in the case of the Sheriffs of Middlesex, arising out of the famous case of *Stockdale v. Hansard*, of returning to the *habeas corpus* in general words a commitment for *breach of privilege*,—which is allowed, on all hands, entirely to oust the jurisdiction of the Common Law courts.

quietly retired with his high-privilege body guard; and the Commons, terrified to contend longer with such an antagonist, let the matter drop."

But an inspection of the Journals proves that no such proceedings ever took place, and shows what the real catastrophe was. The two Houses, after a series of hostile resolutions and counter-resolutions, seemed ready to come to open war, the Commons setting writs of *habeas corpus* at defiance, and the Lords seeming determined to storm "Little Ease," in which a counsel was imprisoned for acting in obedience to their authority. As a preliminary step, they presented an address to the Queen, praying her Majesty to issue the writ of error to reverse the judgment of the Queen's Bench. The Queen returned for answer, "that she saw an absolute necessity for putting an immediate end to the session of Parliament."

A dissolution almost immediately followed, and such was the reaction [APRIL 3, 1705.] that the new elections turned out greatly in favor of the Whigs. In consequence, the Administration was remodelled, and, Lord Keeper Wright being dismissed, the great seal was again offered to Sir John Holt. He was now so popular, and so much respected by all parties, that his accession to a political office would have strengthened the Whig Government; and Lord Godolphin, and the Duchess of Marlborough in the zenith of her sway, pressed him to accept it on any terms he might demand; but he said he was now more unfit for it than ever, as years and infirmities were coming upon him, and it was a day too late for him to be entering on a new career. Sarah thereupon gave the great seal to young Mr. Cowper, of whose youthful beauty she was supposed to be innocently enamored, and Holt was quietly permitted to end his days as Chief Justice.<sup>1</sup>

When the new Parliament met, a large majority of the members were [OCT. 25.] found to disapprove the proceedings of the last House of Commons in the Aylesbury Case; and the plaintiffs in the additional actions, having been discharged out of custody at the termination of the session, were allowed to obtain verdicts and execution against the returning officer without further disturbance. The abuse of privilege by the Commons thus met with its proper corrective.

I cannot altogether defend Holt in this controversy. His judgment in *Ashby v. White* was undoubtedly just. In the subsequent proceedings, although his courage is to be admired, it can hardly be denied that he was carried too far by his Whig zeal against a Tory House of Commons. All that he did, however, was vigorously defended by that great constitutional authority, Lord Somers. For above a century the view of privilege taken by the eleven Judges who differed from him was implicitly followed, but there has recently<sup>2</sup> been a contrary tendency, which became

<sup>1</sup> Lives of the Chancellors, iv. ch. cxiv.; 6 Parl. Hist. 225; 14 St. Tr. 695.

<sup>2</sup> Lord Ellenborough was the first to countenance the notion of examining the commitments of the Houses of Parliament by putting an extreme case:—If a commitment appeared to be for a contempt of the House of Commons *generally*. I would neither in the case of that court nor of any other of the superior courts inquire further; but if it did not profess to commit for a *contempt* but for *some other matter appearing on the return* which could by no reasonable intendment be



rather rampant till checked by the interference of the legislature<sup>1</sup> and the superintendence of a court of error.<sup>2</sup>

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## CHAPTER XXV.

### CONCLUSION OF THE LIFE OF CHIEF JUSTICE HOLT.

HOLT survived this controversy nearly five years, and continued to discharge his judicial duties with undiminished ability and credit; but no other case of great permanent interest arose before him, and he was not in any way mixed up with the important political events which render the latter portion of the reign of Queen Anne so interesting. He adhered steadily to the Whig party, without incurring the slightest suspicion of partiality while presiding on the bench, and he steered clear of all the intrigues by which they rose or fell. From his manly good sense, he must have sadly lamented their imprudent impeachment of Sacheverell; but he was snatched away before their ruin was consummated by this irreparable blunder. Having been summoned [A. D. 1701.] to attend the trial with the other Judges, in the House of Lords,—when it was about to commence he was struck with a mortal disorder. The last day that he ever sat in court was the 9th of February, 1710, and at three o'clock in the afternoon of the 5th day of March following he expired, at his house in Bedford Row,<sup>3</sup> in the sixty-eighth year of his age.

Notwithstanding the factious excitement which then prevailed, the death of this great magistrate produced a deep sensation in the public mind, and the regret of the Tories was embittered by seeing his office given as a reward for the violence with which Serjeant Parker had assailed Dr. Sacheverell and high-church principles. Both parties united in showing respect for the memory of the departed Chief Justice. The interment was to take place at Redgrave, in Suffolk; and not only all the heads of the law, with the barristers and students, but the principal nobility and gentry in London, of all shades of political opinion, attended the funeral procession several miles from the metropolis. The admirers of Sacheverell asserted that if Lord Chief Justice Holt's life had been spared, and he had attended the pending trial, he who had boldly withstood either House of Parliament would have lifted up his voice against this iniquitous prosecution, and declared that the champion of the Church had done nothing worthy of death or of bonds; while the Whigs retorted, that a

considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law and natural justice, we must look at it and act upon it as justice may require, from whatever court it may profess to have proceeded." *Burdett v. Abbott*, 14 East, 150.

<sup>1</sup> 3 Vict. c. ix.

<sup>2</sup> *Howard v. Gosset*.

<sup>3</sup> Then called Bedford Walk. See 2 Lord Raym. 1389.

solemn proceeding instituted to vindicate the principles of the Revolution would have been warmly countenanced by him who had resisted the tyranny of James II., who had been a distinguished member of the Convention Parliament, whose arguments had mainly contributed to the vote that *the throne was vacant*, and who, during his long career, had never swerved from the true principles of civil and religious liberty.<sup>1</sup>

After reaching Highgate, the hearse was accompanied only by the brother of the deceased and a few private friends till it approached the place of its destination, when it was met by an immense assemblage from the surrounding country. The manor of Redgrave is famous in our judicial annals. It had belonged to Lord Keeper Sir Nicholas Bacon; and here he had entertained Queen Elizabeth—when in answer to her observation that “his house was rather too small for him,” he replied “Your Majesty has made me too great for my house.” From the family of the Bacons it had been purchased by Chief Justice Holt, and here he spent his vacations as a private gentleman, mixing familiarly with all ranks, and particularly with the more humble. All the inhabitants of this and the adjoining parishes, as if by one impulse, were now congregated to do honor to him whose face they were to see no more, but whose virtues they were to talk of to their children’s children. They cared little about his political conduct, but they had heard, and they believed, that he was the greatest Judge that had appeared on earth since the time of Daniel, and they knew that he was condescending, kind-hearted, and charitable. We are told that as the body was lowered into the grave prepared for it, in the chancel of the church at Redgrave, not a dry eye was to be seen, and the rustic lamentations there uttered eloquently spoke his praise.

There is now to be admired a magnificent monument of white marble, which his brother erected over his grave at a cost of 1500*l.*, representing him in his judicial robes under a canopy of state, seated between emblematical figures of JUSTICE and MERCY, with the following inscription:—

“M. S.  
Johannis Holt Equitis Aur.  
Totius Angliæ in banco regio  
Per xxi. annos continuos  
Capitalis Justiciarii  
Gulielmo Regi, Annæ Reginae  
Consiliarii perpetui,  
Libertatis ac legum Anglicarum  
Assertoris, Vindicis, Custodis  
Vigilis, acris, et intrepidus.  
Rolandus frater unicus et hæres  
Optime de se merito  
Posuit.”<sup>2</sup>

<sup>1</sup> This seems to have been an anticipation of the contest between Whigs and Tories three years later, when the tragedy of *Cato* was brought upon the stage. “The Whigs applauded every line in which Liberty was mentioned, as a satire on the Tories; and the Tories echoed every clap, to show that the satire was unfelt.”

<sup>2</sup> Biographia Brit.

This praise is certainly well deserved. I should have been glad if the epitaph could have truly added that he was an elegant scholar, an enlightened philosopher, a splendid orator, or a distinguished writer. Agreeing with Speaker Onslow, "that he was not of very enlarged notions," I would not add, "the *better judge*, whose business it is to keep strictly to the plain and known rules of law." According to a pithy expression which I have several times heard from the late Daniel O'Connell, "a judge must be a downright *tradesman*," meaning "the first and indispensable qualification of a judge is that he should thoroughly understand his profession;" and, if he is at all induced to neglect his judicial duties by the allurements of literature and science, or the dangerous ambition of *universality*, it would be much better that he had taste for nothing more refined than the YEAR-BOOKS. But there is no absolute incompatibility between the profoundest knowledge of jurisprudence and any degree of culture and accomplishment. We can conceive that Holt, like Somers, might have been President of the Royal Society, and a member of the Kit-Cat Club. But he seems to have been wholly unacquainted with the philosophers and wits who illustrated the reigns of King William and Queen Anne; and Steele, who celebrates him in the TATLER, evidently speaks of VERUS only as an idol whom he had seen and worshipped from a distance. We are left to conjecture as to his habits; but he must have had benchers and serjeants-at-law, for his companions, and his talk must have been of "contingent remainders." Yet he is the first man for a "mere lawyer" to be found in our annals. Within his own sphere he shone with unrivalled brightness. Perhaps he was carried too far by his admiration of the common law of England, as when he declared that an appeal of murder sued by the heir of the deceased, to be tried by battle, and excluding the Crown's power of pardon, instead of being an odious prosecution and a remnant of barbarism, was "a noble remedy, and a badge of the rights and privileges of an Englishman."<sup>1</sup> His head, likewise seems to have been a little turned by the applause he received for his independence, inasmuch that he told Mr. Raymond (afterwards Lord Raymond, and his successor) that if the House of Lords had determined against him in a case of *Prohibition* which was clearly within their jurisdiction, he would not have held himself bound by their judgment;<sup>2</sup> but, generally speaking, he is to be considered a consummate jurist; above all prejudice; misled by no predilection; seeing what the law ought to be, as well as what it was supposed to be; giving precedent its just weight, and no more; able to adapt established principles to the new exigencies of social life; and making us prefer judge-made law to the crude enactments of the legislature.

He had the merit of effectually repealing the acts against witchcraft, although they nominally continued on the statute book to a succeeding reign. Eleven poor creatures were successively tried before him for this supposed crime, and the prosecutions were supported by the accustomed

<sup>1</sup> Sarah Stout's Case, 1 Lord Raym. 557; 12 Mod. 373—375.

<sup>2</sup> 1 Lord Raym. 545.

evidence of long fasting, vomiting pins and tenpenny nails, secret teats sucked by imps, devil's marks, and cures by the sign of the cross or drawing blood from the sorceress—which had misled Sir Matthew Hale : but, by Holt's good sense and tact, in every instance the imposture was detected to the satisfaction of the jury, and there was an acquittal. One of the strongest *primâ facie* cases made out before him was said to have been that against the woman to whom, many years before, he himself had pretended to be a wizard, and to whom he had given the cabalistic charm which was adduced as the chief proof of her guilt.<sup>1</sup> At last the Chief Justice effectually accomplished his object by directing that a prosecutor who pretended that he had been bewitched should himself be indicted as an impostor and a cheat. This fellow had sworn that a spell cast upon him had taken away from him the power of swallowing, and that he had fasted for ten weeks ; but the manner in which he had secretly received nourishment was clearly proved. He, nevertheless, made a stout defence, and numerous witnesses deposed to his expectoration of pins and his abhorrence of victuals, all which they ascribed to the malignant influence of the witch. The Judge, having extracted from a pretended believer in him the answer that "all the devils in hell could not have helped him to fast so long," and having proved, by cross-examining another witness, that he had a large stock of pins in his pocket, from which those supposed to be vomited were taken, summed up with great acuteness, and left it to the jury to say, not whether the defendant was bewitched, but whether he was *non compos mentis*, or was fully aware of the knavery he was committing, and knowingly wished to impose on mankind ? The jury found a verdict of *guilty*, and, the impostor standing in the pillory to the satisfaction of the whole country, no female was ever after in danger of being hanged or burned in England for being old, wrinkled, and paralytic.<sup>2</sup>

Holt's conduct on this occasion will appear the more meritorious if we consider that he ran great risk of being denounced as an atheist ; and that, to avoid this peril, preceding Judges, who were not believers in witchcraft, had pandered to the prejudice of the vulgar. Says Roger North, "If a judge is so clear and open as to declare against that impious vulgar opinion that the Devil himself has power to torment and kill innocent children, or that he is pleased to divert himself with the good people's cheese, butter, pigs, and geese, and the like errors of the ignorant and foolish rabble, the countrymen cry, 'This judge hath no religion, for he doth not believe witches ;' and so, to show they have some, *hang the poor wretches*."<sup>3</sup>

Holt seems to have had a high reputation among his contemporaries for detecting false pretences of all sorts, and exposing those who put on an aspect of extraordinary sanctity. There existed in his time a "society for the suppression of vice, composed of men who sought to cover their own bad characters and pernicious habits by affecting to put the law in force against others less culpable than themselves. Said Steele, describing

<sup>1</sup> Ante, pp. 121.

<sup>2</sup> 14 St. Tr. 639—695.

<sup>3</sup> Life of Guilford, i. 251.



the Chief Justice as VERUS, "He never searched after vice, nor spared it when it came before him; at the same time, he could see through the hypocrisy and disguise of those who have no pretence to virtue themselves but by their severity to the vicious. In his time there was a nest of pretenders to justice who happened to be employed to put things in a method for being examined before him. These animals were to VERUS as monkeys are to men; so like, that you can hardly disown them; but so base, that you are ashamed of their fraternity. It grew a phrase, 'Who would do justice on the justices?' I have seen an old trial where he sat judge on two of them; one was called Trick-tract, the other Tear-ship; one was a learned judge of sharpers, the other the quickest of all men at finding out a wench. Trick-tract never spared a pickpocket, but was a companion to cheat. Tear-shift would make compliments to wenches of quality, but certainly commit poor ones. These patriots infested the days of VERUS, while they alternately committed and released each other's prisoners. But VERUS regarded them as criminals, and always looked upon men as they stood in the eye of justice, without respecting whether they sat on the bench or stood at the bar."<sup>1</sup>

To a band of fanatics called the "Prophets" Holt had a particular antipathy. One of these, named Lacy, being beaten in a trial before him, complained of injustice. Calamy, the famous Presbyterian divine, relates that, he having repeated these complaints to Holt, "My Lord by this time was moved; and, setting his hands to his side, cried out, *an honest cause did he call it?* I tell you, sir, and you have full liberty to tell him, or any one else you think, from me, that it was one of the foulest causes I ever had the hearing of, and that none but an arrant knave would have had the concern in it that Lacy had; for it was a plain design, in concert with a notorious jilt, to have cheated the right heir of a good estate upon his supplying her with money. If one that could do this may be allowed to set up for a prophet, the world is come to a fine pass."<sup>2</sup>

Holt having, some time after, committed another of this brotherhood, called *John Atkins*, to take his trial for seditious language, the same Lacy called at the Chief Justice's house in Bedford Row, and desired to see him. *Servant*: "My Lord is unwell to-day, and cannot see company." *Lacy* (in a very solemn tone): "Acquaint your master that I must see him, for I bring a message to him from the Lord God." The Chief Justice, having ordered Lacy in and demanded his business, was thus addressed: I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison." *Holt, C. J.* :

<sup>1</sup> Tatler, No. xiv. There must here be an allusion to some well-known "trading justices," belonging to a class who then and for many years after infested the metropolis, till stipendiary magistrates were at length established at Bow Street; but I have in vain endeavored to trace in "Magazines" and "Trials" the individuals whom Holt is here celebrated for having exposed and punished.

<sup>2</sup> Rutt's Life of Calamy, ii. 111-112.

"Thou art a false prophet, and a lying knave. If the Lord God had sent thee, it would have been to the Attorney General, for he knows that it belongeth not to the Chief Justice to grant a *nolle prosequi*: but I, as Chief Justice, can grant a warrant to commit thee to bear him company." This was immediately done, and both prophets were convicted and punished.

It is observable that, even under Holt, criminal trials were not always conducted with the regularity and forbearance which we now admire. For the purpose of obtaining a conviction when he believed the charge to be well founded, he was not very scrupulous as to the means he employed. To the end of his life he persevered in what we call "the French system" of interrogating the prisoner during the trial, for the purpose of obtaining a fatal admission from him, or involving him in a contradiction. Thus in the case, which made a noise all over Europe, of HAAGEN SWENDSEN, indicted capitally for forcibly carrying off an heiress and marrying her, the prisoner having asserted that, before he carried her off, she had squeezed his hand and kissed him, the Chief Justice asked "If she was consenting why then did you force her to the tavern and marry her by a parson you had provided for that purpose?" The prisoner answered, "She married me with as much freedom as there could be in woman." But he was convicted and executed.<sup>1</sup>

Contrary to the doctrine which we hold, that soldiers are armed citizens, and may lawfully, like other citizens, by the command of a magistrate, and on an occasion of extremity even without the command of a magistrate, interpose to prevent the commission of a crime and to preserve or restore public tranquility, Holt is said to have held that the military could only be lawfully employed against a foreign enemy or in quelling open rebellion. But this opinion of his is not to be found laid down on any trial, or recorded in any book of authority, and rests on the following gossiping story: "A party of the guards was ordered from Whitehall to put down a dangerous riot which had arisen in Holborn, from the practice of kidnapping, then carried to a great extent; and at the same time an officer was despatched to inform the Chief Justice of what was doing, and to desire that he would send some of his people to attend and countenance the soldiers. 'Suppose, sir,' said Holt, 'let me suppose the populace should not disperse on your appearance, or at your command?' 'Our orders are then to fire upon them.' 'Then mark, sir, what I say; if there should be a man killed in consequence of such orders, and you are tried before me for the murder, I will take care that you and every soldier in your party shall be hanged. Return to those who sent you, and tell them that no officer of mine shall accompany soldiers; the laws of this kingdom are not to be executed by the sword. This affair belongs to the civil power, and soldiers have nothing to do here.' Then, ordering his tipstaves and some constables to accompany him, he hastened to the scene of tumult, and the populace, on his assurance that justice should be done on the objects of their indignation,

dispersed in a peaceable manner.”<sup>1</sup> Holt certainly did, in his proper person, disperse a riotous assembly in Holborn, with the assistance of a band of constables, but the dialogue between him and the officer of the guards I consider apocryphal. From the earliest times to the beginning of the 18th century, the Chief Justice of the King’s Bench had been in the habit of taking an active part in putting down disturbances.<sup>2</sup> In the Plantagenet reigns, when there were no standing armies or regular troops to be employed for this purpose, I find that he was not unfrequently sent into distant counties with a commission of array, and that he commanded in the field the forces so raised. Holt may very properly have expressed jealousy of the wanton interference of the military, but there is an extreme improbability that he should in such terms have condemned the employment, for the prevention of crime, of a portion of the *posse comitatus* wearing red coats instead of blue, and armed with muskets instead of batons.

Holt continued, like preceding Chief Justices, to act out of court as a magistrate, in taking preliminary examinations against parties accused, and committing them for trial. Recognizances were likewise entered into before him. In the Journal of the second Earl of Clarendon we find the following entry:—“15th August, 1690. About six in the evening, my Lord Lucas went with me to my Lord Chief Justice Holt’s. My brother came just from Tunbridge, and went with me; my wife stayed in the coach. My Lord Chief Justice presently took my recognizances to appear in the King’s Bench the first day of the next term; and in the meantime to give my word and honor not to disturb the Government, and to keep the peace. I said I agreed to all, but to the last clause; which seemed a very odd one, and I could say nothing to it. At Lord Lucas’s desire, I spoke to Lord Chief Justice about Lord Forbes’s bail; who could get none but gentlemen from Ireland. The Lord Chief Justice was very snappish.”<sup>3</sup>

While Chief Justice, he had to fight a battle with the Crown, as well as with the Lords and with the Commons. The great sinecure office of Chief Clerk of the Court of King’s Bench, now compensated by a pension of 9000*l.* a year, falling vacant, Sir John Holt granted it to his brother Roland, and the question arose whether the patronage of it belonged to the Chief Justice or to the King? This came on to be decided by a trial at bar before the three Puisne Judges and a jury. A chair was placed on the floor of the Court for Lord Chief Justice Holt, on which he sat *uncovered* near his counsel. It was proved that the Chief Justices of the King’s Bench had appointed to the office from the earliest times, till a patent was granted irregularly by Charles II. to his natural son the Duke of Grafton; and there was a verdict against the Crown, which was confirmed, on appeal, by the House of Lords.<sup>4</sup>

<sup>1</sup> Examiner, vol. iv. 14; Notes to Tatler, ed. 1806, vol. i. p. 147.

<sup>2</sup> It is likewise a curious fact that the judges of the King’s Bench acted as police magistrates; taking preliminary examinations of witnesses, and committing criminals for trial.

<sup>3</sup> Vol. ii. p. 328–329.

<sup>4</sup> Shower’s Parliamentary Cases, 111; Skinner, 354.

Holt appears in the catalogue of our judicial authors, but does not add to its faint lustre. In the year 1708, he edited a collection of Crown cases from the MS. of Chief Justice Kelynge, adding three judgments of his own, all of which are upon the law of murder and manslaughter.<sup>1</sup> His notice of them in his preface rather shows that he was an instance of a great English lawyer being utterly unacquainted with English composition: "The three modern cases," says he, "are conceived to be of some use, therefore are thought fit to be published; and if they shall be found to be of any benefit, it's what is desired by the publisher thereof."

I am much grieved that we know so little of Holt in private life. He had no chronicler like Roger North, he has left no diary of his own, and there is not even a scrap of a letter of his extant. We must particularly regret that we have so few of his sayings handed down to us for, judging from his reprimand of the "false prophet," they must have been very racy, if sometimes a little irreverent.

He no doubt derived much satisfaction from the able discharge of his official duties, and the high credit which he thereby acquired; but he had no domestic bliss. His wife, Anne, the daughter of Sir John Copley, a lady of strict virtue, was a shrew, and they lived together on the worst possible terms. She fell into ill health, and he was in high hopes of getting rid of her. To plague her husband, she insisted on consulting a physician with whom he had a personal quarrel, and who, for this reason, is said to have taken peculiar pains in curing her. She certainly survived him several years; and Dr. Arbuthnot, afterwards writing to Swift an account of his attendance on Gay the poet, said, "I took the same pleasure in saving him as Radcliffe did in saving my Lord Chief Justice Holt's wife, whom he attended out of spite to her husband, who wished her dead. It is to be feared that although he thought he could define by law the privileges of the Lords and of the Commons, he was obliged to confess that his wife was the sole judge of her own privileges, and that when she pronounced him in *contempt* he was entirely without remedy. He established against the Crown his right to appoint the chief clerk of his court, but the nomination of footmen in his family, as well as of housemaids, rested entirely with his wife."<sup>2</sup> Nevertheless, he left her by his will a jointure of 700*l.* a year.

She brought him no children, and the whole of his great possessions went to his brother Roland, a descendant of whom is still Lord of Redgrave.<sup>3</sup>

I shall conclude this memoir in the words of the writer who first collected material for the Life of Holt, and who thus gives him character-

<sup>1</sup> *Rex v. Lisle, Rex v. Plumer, Rex v. Mawgridge.*

<sup>2</sup> Some maliciously accounted for his unwearied devotion to business by his dislike of the society of Lady Holt,—in the same manner, as in the time of Judge Gilbert, who wrote so many excellent law books shut up in his chambers in Serjeants' Inn, it was said that the public was indebted for them to his scolding wife.

<sup>3</sup> George St. Vincent Wilcox, Esq., great-great-grandson of Roland.



istic praise: "His Lordship was always remarkable in nobly asserting, and as vigorously supporting, the rights and liberties of the subject, to which he paid the greatest regard upon all occasions, and never suffered the least reflection tending to depreciate them to pass uncensured."<sup>1</sup>

## CHAPTER XXVI.

### CHIEF JUSTICES FROM LORD HOLT TILL THE APPOINTMENT OF SIR DUDLEY RYDER.

ON the death of Chief Justice Holt, Lord Godolphin, the Prime Minister, resolved to give his place to Serjeant Parker, who, as one of the managers for the House of Commons in the impeachment of Sacheverell, had greatly distinguished himself. [A. D. 1710.] The Attorney and Solicitor General, Sir James Montagu and Sir Robert Eyre, like all sensible men, disapproving of the prosecution, had been deficient in zeal when they assailed the libeller of VOLPONE; and neither of them had such political importance as to enable them to vindicate a claim to the promotion,—which would then have been peculiarly seasonable, as the Whigs had fallen into deep disgrace, and a change of administration was evidently at hand. The proposed appointment was very disagreeable to the Queen. Having attended Sacheverell's trial, she had been much shocked by the freedom with which Serjeant Parker had ridiculed the divine right of kings and other dogmas of the High Church party, and still more by the acrimony with which he had inveighed against "the Doctor" himself, whom she loved in her heart for his principles, secular as well as religious, and above all for his personal abuse of those ministers with whom she was now so much disgusted. But being warned by Harley, who already, through the Agency of Mrs. Masham, was her confidential adviser, that the time for a rupture with the Whigs was not yet quite arrived, she gave her reluctant consent.

Accordingly, on the 13th of March, 1710, SIR THOMAS PARKER was installed as Chief Justice of the Court of King's Bench, and continued to fill the office for the four remaining years of Queen Anne and the first four years of the succeeding reign. But tracing his eventful career is a by-gone pleasure, for he afterwards held the great seal of England—till he was deprived of it on being convicted of judicial corruption. I must, therefore, refer those who [A. D. 1710–1718.] would know the particulars of his extraordinary rise, and of his lamentable fall, to the "Life of Lord Chancellor Macclesfield," which I have already given to the world.<sup>2</sup>

However, I cannot refrain from expressing my regret that some connections of his family, ashamed of his having been the son of a village

<sup>1</sup> Biographia Brit. "Sir John Holt."

<sup>2</sup> Lives of the Chancellors, vol. iv. ch. cxxi.

lawyer,—of his having been at Newport school, along with Tom Withers the shoemaker,—of his having himself practised as an attorney, and of his having raised himself by his gigantic vigor of intellect, would fain represent him as having enjoyed all the advantages of high birth and regular education,—as having been destined to the bar from his childhood, and as having reached his high honors in the usual routine of professional progress. In overlooking well-established facts respecting him, they surely lessen the merit which belongs to him while he was ascending to eminence,—and they deprive him of the mitigation of early penury for the disreputable practices into which he was led by his excessive love of riches. If I were to re-write his life, I must substantially adhere to my former narrative,—which if he could peruse he would not repudiate; for he never pretended to an aristocratical origin, and he was delighted, when Chief Justice of England, to spend an evening with an old school-fellow who had thrown aside a leathern apron, and whose hands were hard with resin.<sup>1</sup>

When Parker had gained the favor of George I., and, by intrigues [APRIL, 1718.] with the Hanoverians who accompanied that sovereign to England, had subverted the influence of Lord Cowper, another Chief Justice of the King's Bench was to be provided. The new Chancellor was determined that he would not commit the blunder of raising up to high office a formidable rival, by whom he might in turn be superseded. He therefore fixed upon a dull lawyer, of decent character, to whom nothing positive could be objected, and who,—unfit to be placed in the House of Lords,—without aspiring to the “marble chair,” must ever remain his humble supporter.

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I am afraid that the taste of my readers may be a little corrupted by the exciting atrocities of the Chief Justices of the seventeenth century, and that some dismay may be felt upon the introduction of a man who is unredeemed from insipidity by the commission of a single great crime. I own that such company is tiresome, and we shall speedily take leave of him. But I must present a little sketch of this worthy person, who for seven years was Chief Justice of England.

SIR JOHN PRATT's great distinction is, that he was the father of LORD CAMDEN. He was descended, however, from a respectable family long settled at Careswell Priory, near Collumpton, in the county of Devon. He studied at Oxford, and was elected a fellow of Wadham College.—Although an eldest son, it was necessary that he should work for his bread, as the estate which had remained many generations in his name had been alienated by his spendthrift grandfather. He was, therefore, called to the bar in the end of the reign of Charles II., and, by plodding diligence, got into respectable business. In the year 1700 he took the

<sup>1</sup> In a new edition of my *Lives of the Chancellors* I have pointed out his pedigree from the Parkers of Park Hall, and I have shown that he certainly had been entered of Trinity College, Cambridge; but the evidence is strengthened as to the low condition of his father, and the obstacles he had to surmount in the early part of his career.

degree of Serjeant-at-law, and he was twice returned to the House of Commons as member of Midhurst. But he had no talents for public speaking, and in the Parliamentary Debates his name is not once mentioned. He was a good Whig under the patronage of Lord Cowper, who, while disposed to promote him, found him quite unfit for the situation of Attorney or Solicitor General. His practice in the Court of Common Pleas, however, was considerable, for he was well versed in his profession; and, although reckoned heavy elsewhere, he there went by the name of the "lively Serjeant."

Having remained true to his party during the four years of Tory rule, —on the accession of George I. the desire to do something for his advancement was strengthened. Lord Cowper, being restored to the office of Chancellor, in his letter to George III. respecting the state of the bench in Westminster Hall, objected to the continuance of the two brothers Sir Littleton [A. D. 1714–1718.] Powys and Sir Thomas Powys as Judges of the King's Bench, particularly Sir Thomas, whom he denounces as "zealously instrumental in the measures which ruined James II., and as still devoted to the Pretender," and added, "If either of these be removed, I humbly recommend Serjeant Pratt, whom the Chief Justice Parker, and I believe every one that knows him, will approve." Accordingly Sir Thomas Powys was superseded, and Serjeant Pratt, being knighted, was made a Puisne Judge of the King's Bench in his stead.

He sat four years there as a colleague of Parker, who, having during this time had full proof of his docility, inoffensiveness, and moderate sufficiency for the duties of the office, when about to become Lord Chancellor resolved to appoint him his successor. As a step to this distinction, in the short interval between the resignation of the great seal by Lord Cowper and the delivery of it to Lord Macclesfield, it was put into commission, and Pratt was made a Lord Commissioner.

He took his seat as Lord Chief Justice of the King's Bench on the 15th of May, 1718.

His panegyrist (for a Chief Justice is sure to have panegyrists) lauded him—not as a great real property lawyer, or a great commercial lawyer, or a great Crown lawyer, but as "A GREAT SESSION LAWYER:" and in looking through *Strange's Reports*, *Lord Raymond's Reports*, *Burrow's Reports*, and *Modern Reports*, in which his decisions are recorded, it is curious to observe how many of them turn upon questions of poor-rates and parochial settlement—then a new field of litigation. One, and one only, of these judgments is still interesting, from having been married to immortal verse.

The widow of a foreigner, being left destitute on the death of her husband, who had no parochial settlement in England, was removed from a parish in London to the parish in the country in which she was born; but this parish appealed to the quarter sessions against the order of removal, on the ground that a maiden settlement is for ever lost by marriage. The Justices at sessions, being much puzzled, referred the

case to the Court of King's Bench, and the decision there is thus recorded by Sir James Burrow in his Reports :—

“A woman having a settlement  
Married a man with none;  
The question was, he being dead,  
If what she had was gone.

“Quoth SIR JOHN PRATT, the settlement  
Suspended did remain,  
Living the husband; but him dead,  
It doth revive again

(*Chorus of Puisne Judges.*)

“Living the husband; but him dead,  
It doth revive again.”<sup>1</sup>

This decision seems to have created a great sensation in Westminster Hall; but the glory which it conferred on Chief Justice Pratt soon passed away, for, as far as the *suspension* was concerned “living the husband,” it was reversed by his successor, Chief Justice Ryder, who determined, with *his* puisnies, that the maiden settlement continues after the marriage till a new settlement is gained; and that although the wife cannot be separated from the husband by an order of removal, if he, having no settlement, has deserted her, she may be sent to her parish for relief, even in his lifetime :—

“A woman having a settlement,  
Married a man with none:  
He flies and leaves her destitute;  
What then is to be done?

“Quoth RYDER, the Chief Justice,  
‘In spite of SIR JOHN PRATT,  
You’ll send her to the parish  
In which she was a brat.

“‘*Suspension of a settlement*  
Is not to be maintained;  
That which she had by birth subsists  
Until another’s gained.’

(*Chorus of Puisne Judges.*)

“That which she had by birth subsists  
Until another’s gained.”<sup>2</sup>

Chief Justice Pratt acquired considerable credit by his firm conduct [A. D. 1722.] in the famous controversy between Dr. Bentley and the University of Cambridge. When, on the application of this very learned and very litigious scholar, the Court of King's Bench had granted an attachment against his enemy, Dr. Colbatch, the author of *Jus Academicum*, for a contempt of their jurisdiction, Sir Robert Walpole and Lord Macclesfield attempted to exercise their influence in

<sup>1</sup> Burr. Sett. Cas. 124.; Burn's Just., tit. “Settlement.”

<sup>2</sup> *St. John's, Wapping v. St. Botolph's, Bishopgate*, Burr. S. C. 367.; 2 Bott. 109.



his favor. "But," says Bishop Monk, "the patronage of these great ministers was not calculated to render the unfortunate divine any real service. The distinguished Judge who presided on the bench entertained a high notion of the dignity of his court, and the necessity of redressing all attempts to disparage or question its authority. He had, also, too just an opinion of the sanctity of the judicial character not to be jealous of the interference of persons in power with the administration of justice. He heard, therefore, the representations of the Cabinet Ministers without the least disposition to attend to them; insomuch that the Premier accounted for his inflexibility by observing that 'Pratt had got to the top of his preferment, and was therefore refractory and not to be governed by them.'" According to our notions we should rather blame the Chief Justice for suffering interviews with a party in a pending proceeding, for we read with surprise this mitigation of his supposed sternness: However, when Dr. Colbatch, by advice of the Lord Chancellor, waited on the Chief Justice at his house in Ormond Street, he behaved to him with considerable candor and mildness; he declared, indeed, that he viewed the offence in a serious light, but assured him that he would take no advantage of his having privately acknowledged himself author of the book."—The writer of *Jus Academicum*, for having said, in allusion to the Court of King's Bench granting writs of *mandamus* and *prohibition* against the University of Cambridge, "that they who intend to subvert the laws and liberties of any nation commonly begin with the privileges and immunities of the Universities," was sentenced by Chief Justice Pratt to be imprisoned, fined 50*l.*, and bound over to his good behaviour for a twelvemonth.<sup>1</sup>

Then followed Bentley's application for a *mandamus* to the University of Cambridge to restore him to his academical degrees of which he had been deprived without having [A. D. 1723.] been duly summoned or heard. After the case had been argued several successive terms, at prodigious length, Chief Justice Pratt said,—

"This is a case of great consequence, not only to the gentleman who is deprived, but likewise as it will affect all the members of the University. It is the glory and happiness of our excellent constitution, that, to prevent any injustice, no man is to be concluded by the first judgment; but that, if he apprehends himself to be aggrieved, he has another court to which he can resort for relief: with this view, the law furnishes him with appeals and with writs of error; and in this particular case, lest the party complaining should be remediless, it has become absolutely necessary for this Court to order the University to lay before us the state of their proceedings against him, so that if they have erred he may have right done to him, or if they have acted according to the rules of law, their acts may be confirmed. The University ought not to consider it any diminution of their honor, that their proceedings are examinable in a superior court. For my own part I am sure it is a consideration of great comfort to me, that, if I do err, my judgment is not conclusive, and my mistake may be rectified. As to Dr. Bentley's behaviour when

<sup>1</sup> Monk's Life of Bentley, vol. ii. ch. xvi. p. 185.

served with process out of the Vice-Chancellor's Court, I must say that it was very indecent, and I can tell, if he had said as much of our process we should have laid him by the heels for it. But however reprehensible it might be for him to say of the Vice Chancellor, *stultè egit*, such words will not justify a suspension or deprivation of academical degrees. Be these matters how they will, surely he could not be deprived without notice. Our laws adopt the first rule of natural justice, that no man shall be condemned till he has been heard or had an opportunity of being heard in his defence. The Vice Chancellor's authority ought to be supported for the sake of keeping peace within the University, but then he must act according to law, which I do not think he has done in this instance."

The Puisnies concurred, one of them citing a precedent of high authority—*Adam and Eve's case* before God himself. *Fortescue, J.* : "Even God himself did not pass sentence upon *Adam* before he was called upon to make his defence. 'Adam (says God) where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to *Eve* also." A peremptory *mandamus* was granted.<sup>1</sup>

There was only one state trial before Chief Justice Pratt, that of [A. D. 1722, 1723.] Christopher Layer, prosecuted for having conspired to bring in the Pretender by means of a French invasion. On this occasion there was exhibited from the bench a harshness which reminds us much more of ante-Revolution judges than of the mild demeanor of Holt. The prisoner, a gentleman of birth and education, having been brought to the bar at his arraignment loaded with irons, said,—

"My Lord, I hope I shall have these chains taken off, that I may have the free use of that reason and understanding which God hath given me. They have brought upon me the strangury to a degree that is very painful; and if I am told truly that your Lordship is afflicted with that distemper, you will pity me. I hope that these chains shall be taken off in the first place, and then I hope that I shall have a fair trial." *Pratt, C. J.* : "As to the chains you complain of, it must be left to those to whom the custody of you is committed by law, to take care that you may not make your escape; when you come to your trial, then your chains may be taken off." *Sir Robert Raymond, A. G.* : "I am sure nothing is intended but that he should have a fair trial; but to complain here of chains, carries with it a reflection of cruelty, and we know what effect these things may have abroad. The prisoner hath been kept as all persons in his circumstances are when they have been attempting to make an escape." *Pratt, C. J.* : "Alas! If there hath been an attempt to escape, there can be no pretence to complain of hardship; he that hath attempted an escape once, ought to be secured in such a manner as to prevent his escaping a second time." *Sir Philip Yorke, S. G.* : "It is well known that when this gentleman was in the custody of a messenger, he not only made an attempt to escape, but actually escaped out

<sup>1</sup> 1 Strange, 557.; 2 Lord Raymond, 1334.

of a window, two pair of stairs high. It does not become the candor of a person in the prisoner's circumstances to aggravate and make such misrepresentations of the usage he has received." *Gentleman Gaoler of the Tower of London*: "My Lord, he never has attempted to escape since he was in my custody." *Mr. Hungerford, counsel for the prisoner*: "My Lord, I beg to be indulged a few words: that he is in chains now is demonstrable, and he hath told me they are so grievous that he cannot sleep but in one posture—on his back. Your Lordship may observe that the Gentleman Gaoler, who seems to execute [A. D. 1723-1725.] his authority with all humanity, now helps to hold up his chains, otherwise he could not stand. I believe I might challenge them to give an instance where any prisoner was shackled with irons in the Tower before Mr. Layer. His Majesty's prisoners in the Tower are such strangers to this usage, that the very materials were wanting there; these fetters were sent for from Newgate, and I hope they will be sent back thither. Your Lordship hath hinted it as an indulgence intended to him when he comes to his trial, that his irons shall be taken off; but I humbly insist upon it, that by law he ought not to be called upon even to plead, till he may exercise his mental faculties free from bodily torture." *Pratt, C. J.*: "This is nothing but to captivate the people. What signifies his chains being taken off this minute, and afterwards put on again the next?" *Mr. Hungerford*: "We might humbly apprehend and hope, my Lord, that the better to prepare himself for his trial, he may continue without his chains till after that time." *Pratt, C. J.*: "I am of another opinion; and if we should order his chains to be taken off, and he run away, I do not know but we are guilty of his escape. He shall have a fair and just trial, but to make objections in matters of this nature is to cast a reflection on the Court for not doing that which is not in their power to do."

The prisoner was undoubtedly *guilty*, but the harsh manner in which his trial was conducted throughout excited a strong sympathy in his favor: he was regarded as a martyr; and his head being stuck upon Temple Bar, it was carried off, and long preserved as a relic.<sup>1</sup>

I am not aware of Pratt coming upon the political stage on any other occasion, except when he was consulted with the other Judges upon the question which arose out of the disputes between George I. and the Prince of Wales (afterwards George II.) respecting the power of the reigning King, by his prerogative, to regulate the Education and marriages of his grandchildren. He spoke immediately after Baron Montagu, who had no better reasons to give in favor of the King than the discipline among the patriarchs, who educated and governed all their grandchildren and great-grandchildren, and that the King is called "*parens patriæ et custos regni et pater-familias totius regni.*" Pratt tried to fortify himself by modern precedents:—

"The regulation of marriages in the royal family," said he, "is an undoubted prerogative of the Crown, proved by all the arguments the nature of the thing is capable of, constantly claimed, enjoyed, and sub-

<sup>1</sup> 16 St. Tr. 94-324.

mitted to, the contrary being ever taken to be a great offence and sometimes thought high treason. The countess of Shrewsbury's case, 12 Rep. 94, is very strong. The Duke of Suffolk's attempt was held high treason, proving that, at all events, it is an offence of magnitude. The case of the Princess of Orange in Charles II.'s time is very material. The King made the match, and the Duke of York her father was against it. The Princess of Modena wished to prevent it; but the King's answer was, 'it is by my consent, and none may gainsay it.' Here is the claim of prerogative against the opinion and wishes of the father. Now as to the education of the children and grandchildren of the royal family, that is a natural and necessary consequence,—if the Crown has the marriage of the royal family, it hath the care of their education. If not educated well, they cannot be married well. The King having the end, should have the means; he must take care of their persons that they may not be disposed of to the prejudice of the nation. This prerogative never was disputed by any of the royal family, and many have been prosecuted for the breach of it. Not a few of the distractions and confusions which attended the differences between the Houses of York and Lancaster arose from the marriages and education of the children of the blood royal not being regulated by the sovereign on the throne."<sup>1</sup>

When Lord Macclesfield, on his impeachment for corruption, was deprived of the great seal, there was a general expectation that it would have been transferred to the Chief Justice of the King's bench, who, without being an intriguer, like his predecessor, was well esteemed both by the King and the Prime Minister, and probably would have been preferred by them to Sir Peter King, the Chief Justice of the Common Pleas; but, while the impeachment was pending, Sir John Pratt was struck with a mortal disorder, of which he died at his house in Ormond Street, on Wednesday, the 24th of February, 1725.

If he was not very eminent for his talents or public services, it should be known to his credit that no graver charge was ever brought against him than that, "being the proprietor of Begeham Priory, in Kent, he dismantled the church, the roof of which was still standing, and laid out the site of it in a pleasure-garden, with flowers and gravel walks."<sup>2</sup>

Having had an immense number of children by two wives, and having been careless about his pecuniary affairs, he left his family nearly destitute; but if he had been favored with a glimpse into futurity he might have seen a son of his Lord High Chancellor, and his grandson and great-grandson marquesses and knights of the garter.

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Sir John Pratt was succeeded in the office of Chief Justice of the King's Bench by a man very distinguished in his day, who was himself raised to the peerage, and was looked upon as the founder of a patrician house, but whose line soon became extinct, and is now little known beyond the precincts of Westminster Hall.

Although LORD RAYMOND was said to be descended from the Crusader

<sup>1</sup> 15 St. Tr. 1216.

<sup>2</sup> Hasted's Kent, ii. p. 380.



of his name celebrated by Tasso, his branch of the family had fallen into great decay, and his grandfather was a trader in the City of London. His father, however, studied the law, had considerable success at the bar, and in the reign of Charles II., by the combination of extraordinary learning and extraordinary servility, was made a Puisne Judge, first of the Common Pleas, and then of the King's Bench. This unprincipled Judge showed peculiar zeal in the famous *QUO WARRANTO* prosecution for subverting the liberties of the City of London. Chief Justice Saunders being then at death's door, Sir Thomas Raymond loudly declared that "the Court was unanimously in favor of the Crown on all the points which had been discussed;" and he might probably have succeeded in his object if he had not been rivalled by Jeffreys, whose splendor of infamy dimmed every lesser noxious light which might otherwise have attracted the execrations of mankind. The aspiring Puisne himself died (some said from vexation at his disappointment) while still a young [A. D. 1683.] man. If he had survived, he no doubt would have been tried in the capacity of Chief Justice by James II.; and, if there had been no limit to his servility, he might have continued to preside till the King's power to dispense with all statutes, and to enforce martial law in time of peace, after being established by judicial decision, was upset by physical force. He left behind him a high reputation as a lawyer, although a very bad one as a politician; and a volume of Reports compiled by him proves that he was a complete master of all the wiles of his profession.<sup>1</sup>

At his death, his only son Robert, the subject of this little memoir, was only ten years old, and so escaped the contamination of his training. The lad naturally called himself a Tory, and he continued inclined to high prerogative notions till he saw reason to change his side; but through life he maintained a fair character for honor and independence.

I find no more authentic account of his education than the inscription on his tomb, which represents him as having been early imbued with a love of classical learning, and as having devoted himself with extraordinary assiduity and success to a scientific study of jurisprudence.

He was called to the bar in the year 1694, being then an accomplished lawyer, and he soon got into extensive practice.

His professional prosperity he himself ascribed to his habit of reporting. He was determined to rival, and he greatly excelled, the fame of his father in this line. Not only when he was a student, but when called to the bar, when Attorney General, and when Chief Justice, he wrote an account of all the most remarkable decisions in the Court of King's Bench, giving the arguments of counsel and the opinions of the judges with admirable point, vigor, and exactness.<sup>2</sup>

The first considerable case in which he appeared as counsel was the prosecution, before Lord Holt, of Hathaway the impostor, who pretended that, being bewitched, and having fasted [A. D. 1702.] forty days, he vomited pins, and who, under pretence of disenchanting himself, had assaulted and drawn blood from the supposed witch. Mr.

<sup>1</sup> He died while on the circuit in the spring of 1683, in the 50th year of his age.

<sup>2</sup> His published Reports extending from Easter, 6 Will. & Mary, to Trinity, 5 & 6 Geo. II.

Raymond was mainly instrumental in obtaining the conviction of this miscreant, which opened the eyes of the public to the frauds and follies of witchcraft, although, during the seventeenth century [A. D. 1710.] they had strangely grown with advancing knowledge, to the unspeakable disgrace of legislation and of the administration of criminal justice in England.<sup>1</sup>

He likewise assisted in prosecuting the famous Beau Fielding for bigamy in marrying the Duchess of Cleveland, his former wife being then living. The case turned chiefly upon the validity of the first marriage by a Roman Catholic priest in a private room, and Mr. Raymond's argument to prove its validity prevailed.<sup>2</sup>

Being much connected with the Jacobites, he was employed as counsel for David Lindsay, member of a distinguished family in Scotland, who, having gone from that country to France, in the service of the exiled [A. D. 1710.] James II., had come into England without having obtained permission under the privy seal to do so, and was now indicted on an act of the English parliament which made it treason for any of the King's subjects who were abroad when it passed, to come into England, without the King's permission under the privy seal first had and obtained. The facts were not disputed, and the case resolved

<sup>1</sup> The severest statutes against witchcraft were passed after Lord Bacon had published the most valuable of his immortal works, and they were blindly acted upon in the age of Milton and Dryden. Mr. Raymond had drawn the indictment against Hathway. A specimen of his legal Latinity taken from it may amuse the reader:—"Quod quidem Richardus Hathway nuper, &c., laborer, existens persona malor' nomenis et famæ et impostor, et machinans et malitiose intendens quandam Saram Morduck ux' cujusdam Edwardi Murdock, Waterman, foeminam per totum vitæ suæ tempus existen' honestam et piam, et non Sagam (Anglice, a witch, nec Magiam (Anglice, witchcraft), Incantamentum (Anglice, enchantment), Fascinationem (Anglice, sorcery), unquam exercen', in periculo vitæ suæ ammissionis inducere 11 die Febr. &c. in presentia et auditu diversorum personarum, falso, militiose, diabolice et scient', et ut falsus impostor, prætenebat et aserebat seipsum per eand' Saram fuisse fascinatam (Anglice, bewitched) et occasione fascination' illius non posse edere et per magum tempus scil' per tempus decem septeminar' jejunasse, ac diversis morbis affici, et quod ipse per ipsius Richardi extractionem sanguinis ejusd' Saræ per sculptionem a prætens' fascinatione præd' liberat' foret; quodque prædict Richardus, vi et armis eandem Saram scalpset, et sanguinem ipsius Saræ per scalption' ill' extraxit, &c., ubi revera et in facto præd. Richard' nunquam fascinat' fuit et nunquam jejunasset per spatium præd' nec per aliquod madnum tempus," &c. &c.

The sentence will give pleasure. After saying that he is to pay a fine of 100 marks, it thus proceeds:—"Et quod statim in et super pilloriam Die Sabbati proximo in magis publico et aperto loco in Southwarke, inter horam decimam et horam tertiam ejusdem diei per spatium duarum horarum cum papiro super caput ejus denotante offensam suam," &c. The same ceremony is to be repeated before the Royal Exchange, and again at Temple Bar. Then he was to be committed to the House of Correction:—"Et quod flagelletur die proximo post adventum suum in Domum Correctionis prædict' et quod custos prædict' custodiat eum quotidie ad duram laborem per spatium dimidii unius anni."—14 St. Tr. 639.

<sup>2</sup> 14 St. Tr. 1327. *Secus* if the clergyman had been a Presbyterian minister. This compliment to the Church of Rome became necessary from the Anglican Church acknowledging the sufficiency of Popish orders, so as to keep up its own descent from the Apostles.

itself into a question of law, "whether a native of Scotland was bound by this statute?" Mr. Raymond powerfully argued that, Scotland and England remaining separate and independent, the Parliament of England could not legislate for Scotland or Scotchmen: but, in answer, the Attorney General cited *Calvin's case*, which was intended for the benefit of Scotland, and by which it was decided that all Scotchmen born since the union of the crowns by the accession of James I. were to be considered entitled to the same privileges as native-born Englishmen. Mr. Raymond, in reply, without impeaching the authority of this very questionable judgment, argued that a native-born Scotchman might be permitted to inherit and hold lands in England, without being liable while he remained in his own country, or did not reside in England, to be subjected to the pains of treason by an English Parliament. Chief Justice Holt and the other Judges present overruled the defence, and sentence of death was passed upon the prisoner; but, the public being shocked by such a straining of the law, he was respited and pardoned.<sup>1</sup>

Mr. Raymond, although he devoted the greatest portion of his time to his profession, was by no means indifferent to politics, and still cherished a cordial hatred to the Whigs. He saw, therefore, with extreme delight the blunder which they committed in the impeachment of Sacheverell, and he assisted Harcourt with his advice in defending the [MAY 13.] champion of the High Church. Accordingly, he was re-warded with the office of Solicitor General, and received the honor of knighthood.

As member for Lymington, in Hampshire, he now entered the House of Commons; but he seems to have confined himself, while in office, to the routine law business of the Government there.

He attached himself chiefly to Bolingbroke, and he is supposed to have been privy to the scheme of this bold intriguer to bring in the Pretender at the death of Queen Anne. Of course he was turned out on the accession of George I.

For six years he remained in opposition,—occupied, like most of his contemporaries, in intriguing alternately with the banished royal family, and with Tories who were willing to submit to the established order of things if they themselves might hope by any chance to get into power.

The only great display of his eloquence preserved to us is his speech against the Septennial Bill, which is very curious as showing us that the Church-and-King men of that day held [A. D. 1716.] the same language with the modern Chartists respecting annual parliaments:—

"I fear," said he, "the prolonged duration of parliaments will be no cure for the general corruption supposed to arise from frequent elections; for as the period for which the member is to sit is prolonged, the price of his return will increase in the same proportion. An annuity for seven years deserves a better consideration than for three, and those who are willing to give money for their seats will be governed in the bargain by the true principles of commerce. Nothing will so effectually

<sup>1</sup> 14 St. Tr. 987-1036.



check corruption as annual parliaments. That was our ancient constitution, and every departure from it has been mischievous. A long parliament is plainly destructive of the subject's right, and many ways inconsistent with the good of the nation. Frequent new parliaments are our constitution, and the calling and holding of them was the practice for many ages. Before the Conquest, parliaments were held three times every year,—at Christmas, Easter, and Whitsuntide. In Edward III.'s reign it was enacted 'that parliaments shall be holden every year, or oftener if need be.' This must be understood of new parliaments, for prorogations and long adjournments were not then known, and were not heard of till the reign of Henry VIII., who found that it best suited his tyrannical purposes to keep up a standing body of slavish representatives whom he had corrupted or intimidated." After giving at great length the history of the Triennial Act about to be repealed, he thus concluded!—"Frequent and new parliaments create a confidence between the King and his people. If the King would be acquainted with his people and have their hearts, this is the surest way. I can hardly think that you wish to perpetuate yourselves; yet you might do so on the same arguments; and if you pass this bill, I cannot doubt but that before the end of the seven years there will be another bill for a further prolongation. But at the end of the time for which you were chosen, the people will say, 'you are no longer our representatives; we chose you for three years and no longer, and you cannot choose yourselves for an extended period; henceforth you are usurpers, and we have a right to put you down.' And I must say that, in my own poor opinion (with great submission do I speak it) King, Lords, Commons, can no more continue a parliament, than they can create a parliament without the choice of the people."<sup>1</sup>

As the seeming stability of the new dynasty improved, the high Toryism of Sir Robert Raymond was softened down; and, at [A. D. 1720.] last, he was induced to take office, along with Walpole and Townshend, in the administration of Lord Stanhope. A vacancy in the office of Attorney General arose, when (*horresco referens*) Letchmere, who had enjoyed some eminence in his day, was consigned to oblivion by being created Chancellor of the Duchy of Lancaster and a peer. Raymond had contracted an intimacy with Walpole during the short period when this sagacious statesman was himself in opposition; and, being warned by him against the evils of permanent banishment from power, professed to discover that the Whigs were now much more reasonable than when headed by Godolphin and Marlborough, and declared that he might join them without any sacrifice of principle or consistency. He refused to serve under Sir Philip Yorke, who, about a year before, had been appointed Solicitor General at the age of 28, and whose friends were impatient for his further promotion. Many taunts were thrown out against the renegade Tory; but Walpole, knowing his value as a law officer of the Crown, warmly supported him, [MAY 9.] and, on the retirement of Letchmere, he became Attorney



It is to the credit of Raymond and Yorke that they acted together very cordially. The chief state trial which they had to conduct jointly was the prosecution of Christopher Layer for high treason. On this occasion, Mr. Attorney General Raymond thought himself bound to show that he was now entirely free from the [Oct. 1722.] taint of Jacobism, and thus he commented upon the prisoner's scheme to bring in the Pretender:—

“Gentlemen of the Jury: You will readily agree with me that nothing can be more dreadful to a true Briton who hath any regard for himself or his posterity, or love to his country, than the fatal consequences which must inevitably have attended such wicked designs had they been carried into execution with success. What could any one have expected from a rebellion in the heart of the kingdom, but plunder and rapine and murder, a total suspension of all civil rights, and a terrible apprehension of something yet worse to come? All this must have been endured, even if the attempt should have been disappointed at last. But had it prospered, had his Majesty's sacred person been seized and imprisoned, and had the Pretender been placed on the throne, what a scene of misery had opened! A mild administration, governed by the law of the land under an excellent prince and as just and merciful as ever wore the crown, must have given way to arbitrary rule under a popish tyrant; all your estates must have been at the will of a provoked and exasperated usurper; liberty must have been for ever subverted, and the best of religions would be suppressed by Romish superstition and idolatry. Nor would these dreadful calamities have been confined within the bounds of his Majesty's dominions: for should the present happy establishment in this kingdom (the chief bulwark of the Reformation) be destroyed, there is great reason to fear that the Protestant religion would ere long be extinguished.”

He then proceeded to open the facts of the case in a style of invective and rhetorical exaggeration which would be very much censured in an Attorney General of the present times, but which was then thought quite excusable. The prisoner was certainly guilty, and Raymond, by all except his old friends the Jacobites, was praised for convicting him.<sup>1</sup>

Nevertheless, Mr. Attorney found his position, both at the bar and in the House of Commons, rather irksome. Bishop Atterbury's case came on; and, in taking part against this celebrated prelate, he incurred much odium, and was often reproached as a turn-coat. He therefore wished for the tranquillity of the bench; and there being no [A. D. 1724.] chiefship likely to become vacant soon, he astonished the world by sinking into a Puisne Judge of the Court of King's Bench, in the room of Mr. Justice Eyre. There never before had been an instance of an Attorney General accepting a puisne judgeship, and hardly any of his condescending even to become Chief Baron of the Exchequer. Till the Revolution, when parliamentary government was established, and the practice began of his going out with the administration which had appointed him, his tenure was as secure as that of the judges; and, draw-

<sup>1</sup> 16 St. Tr. 94-324.

ing higher emoluments than any of them, the great seal alone could tempt him readily to give up his office as long as his health and strength enabled him to discharge its laborious duties. Raymond now, probably, rued his *ratting*, but return to Toryism was impossible, and his only resource was a retreat in which he would be entirely rescued from politics.

On the 31st of January, 1724, he was called Serjeant, giving rings with the motto "*Salva libertate potens*," and, on the 3d of February following, he took his seat as junior Judge in the Court of King's Bench.<sup>1</sup>

Henceforth he devoted himself exclusively to his judicial duties, and he soon showed that he was destined to acquire the reputation of a great magistrate. He was not only familiarly acquainted with all professional technicalities, but he possessed an enlarged understanding, and he was capable of treating jurisprudence as a science. He therefore rose very much in public estimation, and (what was of more importance to his further advancement) he retained the friendship of Sir Robert Walpole, who had become Prime Minister, and was desirous of indemnifying him for the sacrifices he had made in joining the Whigs.

Accordingly he was appointed a Lord Commissioner of the Great Seal [A. D. 1725.] when Lord Macclesfield was forced to resign it; and some thought that he was likely to be the successor of that illustrious delinquent. But it so happened that, about the same time, Lord Chief Justice Pratt died, and he infinitely preferred the chiefship of his own court to being again launched on the tempestuous sea of politics. He himself, at the commencement of his Reports for Easter Term, 1725, gives us this simple statement of his elevation:—

"*Memorandum*: that Sir John Pratt, Knight, Chief Justice of the King's Bench, died Wednesday, February the 24th last past, and I was created Chief Justice in his place by writ bearing teste March 2, and was sworn into the office March 3 following before Sir Joseph Jekyll, Knight, Master of the Rolls, and Sir Jeffrey Gilbert, Knight, one of the Barons of the Exchequer, then two of the Lords Commissioners for the custody of the Great Seal; notwithstanding which, I continued one of the Commissioners of the Great Seal, and Serjeant Reynolds was sworn in before me and the other Lords Commissioners to be my successor as a Puisne Judge."<sup>2</sup>

He continued to preside in the Court of King's Bench, with high distinction, above seven years; and as a testimony of respect for his services, he was raised to the peerage by the title of Lord [JAN. 15, 1731.] Raymond, Baron Raymond of Abbots Langley in the county of Hertford, being the third Chief Justice of the King's Bench who had received a similar honor.<sup>3</sup>

<sup>1</sup> The next judge who followed this example was Sir Vicary Gibbs. "When Mr. Percival was shot at," says Lord Brougham, "his nerves, formerly excellent, suddenly and entirely failed him; and he descended from the station of Attorney General to that of Puisne Judge in the Common Pleas."—*Statesman*, vol. i. p. 133.

<sup>2</sup> 2 Lord Raymond, 1381.

<sup>3</sup> Coke, Hale, and many others, are still called Lords; but Jeffreys and Parker

We know from contemporary testimony that he was much admired and respected as head of the Common Law; but we have now very slender means of estimating his merits. Although he continued the Reporter of the Court of King's Bench, and he has handed down to us many of his own decisions, he does by no means the same justice to himself which he had done to Lord Holt. This Chief would have been immortalized by his judgment in the *Aylesbury Case* on parliamentary privilege, and in *Coggs v. Bernard* on the doctrine of bailments, as Lord Raymond has given them to the world—but, from modesty, or from want of leisure, or from carelessness, during the time when he himself presided, he hardly ever mentions the Chief Justice separately, and generally introduces the determination of the case with the words "*Per Curiam*," or "the Court thought," or "we were all agreed." Nor do the cases at that period seem to have been numerous or important; and to fill up time, and to appear to have an air of business, the most was made of every matter which came in for adjudication. Thus the question "whether *nil debet* was a good plea to an action of debt on a deed to recover a penalty for breach of covenant?" was solemnly argued four different times, in four successive terms, before the Court would hold the plea to be bad.<sup>1</sup>

But I can give specimens of Lord Chief Justice Raymond's performances which do him credit. He it was who first established the important doctrine that to publish an obscene libel is a temporal offence, subjecting the party to be prosecuted and punished as for a misdemeanor. The infamous Edmund Curl, held up to eternal detestation and ridicule by Pope in the *DUNCIAD*, was charged by a criminal information in the language then used—"Quod ille existens homo iniquus et sceleratus ac nequiter machinans et intendens bonos mores [A. D. 1727.] subditorum hujus regni corrumpere, et eos ad nequitiam inducere, quendam turpem et obscœnum libellum, intitulatum 'Venus in the Cloister, or the Nun in her Smock,' impie et nequiter impressit et publicavit ac imprimi et publicari causavit [setting out the several lewd passages in English] in malum exemplum," &c. Having been tried and found guilty by the jury, his counsel moved in arrest of judgment on the ground that, however he might have been punishable in the Ecclesiastical Court for an offence *contra bonos mores*, this was not an offence of which the com-

were the only preceding Chief Justices who had been ennobled, and doubts had been entertained whether a peer could sit as a common law judge.

"1730 (1), Jan. 21. Then Sir Robert Raymond, Kt., Ld. Ch. J. of His Majesty's Court of King's Bench, being, by letters patent, dated 15 die Januarii 1730. Annoq. regni Georgii Secundi Regis Quart, created Lord Raymond, Baron of Abbots Langley, in the county of Hertford, was in his robes, introduced, between the Lord De Lawarr, and the Lord Bingley, also in their robes; the Gentleman Usher of the Black Rod, Garter King of Arms, the Deputy Earl Marshall of England, and the Lord Great Chamberlain, preceding. His Lordship presented his patent to the Lord Chancellor, on his knee, at the woolsack; who delivered it to the clerk; and the same was read at the table. His Lordship's writ of summons was also read," &c. He then took the oaths, and was "placed on the lower end of the Barons' Bench."—23 *Lords' Journals*, 591, 592.

<sup>1</sup> *Warren v. Cousett*, Tr. Term, 13 Geo. I.; 2 St. Tr. 778.



mon law could take cognizance; arguing that "notwithstanding the filthy run of obscene publications in the reign of Charles II., there had been no prosecution for any of them in the temporal courts, and that whatever tends to corrupt the morals of the people ought to be censured only as an offence against religion by my Lords the Bishops." Of this opinion was Mr. Justice Fortescue, who said,—

"I own this is a great offence, but I know of no law by which we can punish it. Common law is common usage, and where there is no law there can be no transgression. At common law, drunkenness and cursing and swearing were not punishable. This is but a general solicitation of chastity; and to make it indictable, there should be a breach of the peace."

*Lord Raymond, C. J.*: "I am of opinion that to publish any writing which reflects on religion, virtue, or morality, is an act which tends to disturb the civil order of society, and is a temporal offence. It is not merely a sin, but a crime; it is directly hurtful to others, as well as contrary to the soul's health of the offender. Why is this court called the *censor morum* if we cannot punish that which subverts all morality? For verbal scandal there may be a suit in the spiritual court, and penance may be inflicted; but for the injury done to the public by an obscene libel, this is the proper tribunal."

The matter stood over till another term, when, Mr. Justice Page having succeeded Mr. Justice Fortescue, the Judges were unanimous in discharging the rule to arrest the judgment, and the defendant was set in the pillory, "as," says the reporter, "he well deserved."<sup>1</sup>

It was in Lord Raymond's time that the law of murder and manslaughter was brought to the degree of precision in which we now find it, with all its nice distinctions and refined qualifications. The practice then prevailed of the jury finding the facts by a special verdict, and leaving the guilt or innocence, or the degree of guilt, of the prisoner as a question of law to the judges.

One of the most interesting cases of this kind was the trial of Major [A. D. 1725.] Oneby for the murder of Mr. Gower. These two gentlemen, noted for their fashion and gallantries, had a dispute while playing at hazard in a tavern in Drury Lane, and the prisoner called the deceased "an impertinent puppy;" the deceased answered, "whoever calls me so is a rascal." The prisoner then threw a bottle at the head of the deceased, which brushed his peruke as it passed, and beat some hairpowder from it. Thereupon the deceased tossed a candle at the prisoner without hitting him. They both drew their swords, but were prevented by the company from fighting, and again sat down to play. At the expiration of an hour the deceased said to the prisoner, "We have had hot words; you were the aggressor, but I think we may pass it over," and at the same time offered him his hand;—to which the prisoner answered, "No, damn you! I will have your blood." The reckoning being paid, the company had all left the room except the prisoner, who, addressing the deceased, said, "Young man, come back;

<sup>1</sup> 2 Str. 788.; 17 St. Tr. 153.



I have something to say to you." The deceased returned. Immediately the door was closed, and the clashing of swords was heard. When the company re-entered they found that the deceased had been run through the body by the prisoner,—and next day he died of his wounds. The prisoner had received three slight wounds in the rencounter. The deceased on his death-bed being asked "whether he received his wound in a manner called *fair* among swordsmen?" answered "I think I did." The jury found that, "from the throwing of the bottle till the mortal thrust was given, there had been no reconciliation between the parties ;—but whether this was murder or manslaughter, they prayed the advice of the Court." The counsel were about two years in drawing up the special verdict which stated these facts ; and the prosecutor took no steps to bring the case to a hearing, seeming rather inclined to let the proceedings drop. But the prisoner, who had been living all the time gaily in Newgate, grew very confident, and fee'd counsel to move the Court to fix a day for proclaiming his innocence. The special verdict was twice argued ; first before the four Judges of the King's Bench, and then before all the twelve Judges of England.

*Serjeant Eyre* and *Mr. Lee* (afterwards Chief Justice), counsel for the prisoner, argued that this was a case of manslaughter, for which the punishment was merely burning in the hand ; contending that "there was here no *malice aforethought*, which was necessary to murder ; the killing was on a sudden occasion ; manslaughter is killing without premeditation ; *ira furor brevis est* ; and therefore, as a madman, the party is excused for what he does in a transport of passion : the calling the prisoner *a rascal* was what no man of honor could put up with, and this was the beginning of the quarrel ; the fighting was as sudden as the reproachful words ; words alone would not reduce the offence to manslaughter, and if the prisoner had at once stabbed the deceased it might have been murder ; but there was an interchange of blows, and the deceased himself allowed that it was a *fair fight* : there was an interval, but no reconciliation, and the law has fixed no certain time when the presumption arises that the passions of men are cooled : besides, no one saw the beginning of the actual affray ; the deceased certainly struck several blows, and might have first struck and wounded the prisoner before the latter even drew his sword the second time : the law under such circumstances would mercifully presume *provocation*, which would reduce the case to manslaughter."

Lord Raymond, in a very long and most admirable judgment, pronounced the unanimous opinion of all the Judges that the prisoner was guilty of murder. After showing that the malice necessary to constitute murder was not a settled danger or long cherished revenge, but unprovoked deadly violence without provocation or excuse, he observed,—

"Mr. Gower did nothing that could reasonably raise a passion in Major Oneby. The answer of Mr. Gower, on being called *an impertinent puppy*, was not more than might have been expected, that 'whosoever called him so was a rascal.' Major Oneby, who had begun the abusive language, then violently threw the glass bottle. After they had been

restrained from fighting, and had sat an hour at play, the proposal of Mr. Gower ought to have appeased Major Oneby; but what was his answer? 'No, damn you, I will have your blood!' These words show his malicious intent even in throwing the bottle. Then followed the imperious and insolent command, 'Young man, I have something to say to you!' As soon as Mr. Gower had returned, the door is shut, and a clashing of swords is heard, when Mr. Gower received the mortal wound of which he died. If the prisoner had malice against the deceased, though they fought after the door was shut, the interchange of blows will make no difference; for if A. has malice against B. and meets B. and strikes him, B. draws, A. flies to the wall, A. kills B., it is murder. Nay, if the case had been that there was mutual malice, and they had met and fought, the killing had been murder. All the Judges are of opinion that in this case there was malice in the prisoner. The defence rests upon this being a sudden quarrel in which there was great provocation from the deceased; but if there was sufficient time for the blood to cool, and reason to get the better of the transport of passion before the mortal wound was given, the killing will be murder, and all the Judges are of opinion that the act was deliberate. It was not necessary that *malice* should be found by the jury in the special verdict. This is matter of law for the Court. The jury may find a general verdict, either that the prisoner is guilty of murder or of manslaughter; but if they find the facts specially, the court is to draw the conclusion, whether there was malice, or whether the deed was done on a sudden transport of passion. It has been adjudged that if two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder, for there was time to allay the heat, and their meeting was of malice. Though the law of England is so far peculiarly favorable (I know no other law that makes such a distinction between murder and manslaughter) as in some instances to extenuate the greatest of private injuries, as the taking away a man's life is, yet it must be such a passion as for the time deprives him of his reasoning faculties; for if it appears that reason has resumed her sway over him, if it appears that he reflects, deliberates and considers before he gives the fatal stroke, the law will no longer, under the pretext of passion, exempt him from the punishment inflicted on murder. It is urged that, from the prisoner's three wounds, a new and sudden quarrel might have arisen, in which Mr. Gower might be the aggressor; but it lies on the party indicted to prove this quarrel, and none such being found by the jury, we are not at liberty to presume that there was any. The last fact relied upon is, that Mr. Gower on his death-bed allowed that the *fight was fair*. The answer is, that if A. have malice against B., and they meet and fight, though the fight is never so fair according to the law of arms, yet if A. kills B. it will be murder." Lord Raymond then cited all the authorities on the subject from the earliest times in support of the doctrines he had laid down, and he concludes his own report of the case with the following "*Memorandum*: As soon as I had delivered this resolution, I desired my brothers Fortescue, Reynolds, and Probyn, that if they disapproved anything I

had laid down, they would express their disapprobation, but they publicly declared that they consented *in omnibus*.<sup>1</sup>

The prisoner declared that, "as he hoped for mercy at the hands of Almighty God, he had never used the expression so much pressed against him, '*I will have your blood*;' and, having fought with distinction in all the Duke of Marlborough's campaigns, he prayed 'that he might be recommended to his Majesty's clemency for his past services in the cause of his country.'"

*Lord Raymond*: "As to the words, seeing that they were sworn to, and stand in the special verdict, I am sorry to say your denial can avail you nothing; and, we sitting here only to declare the law, you must apply elsewhere for mercy."

Mr. Justice Fortescue, the senior Puisne Judge, pronounced sentence of death. Before the day fixed for the execution, came news of the death of George I. at Osnaburgh, and great interest was made with the new Sovereign to begin his reign with an act of grace by pardoning Major Oneby; but George II. declared that, "the Judges having unanimously adjudged the prisoner guilty of murder, the law should take its course." Nevertheless, Major Oneby disappointed the executioner by opening an artery in his arm, so that he bled to death, the night before the day when he was to be hanged at Tyburn,<sup>2</sup> and he was buried in a highway with a stake driven through his body. Although he had been a gallant soldier, he was a man of very bad moral character, having lived, since his regiment was reduced at the Peace of Utrecht, as a professional gamester, and having before killed several antagonists in duels brought on by his extreme arrogance.<sup>3</sup>

The next trial for murder which I have to mention arose out of an address to the public by THOMSON, in his WIN- [A. D. 1730.] TER, in favor of the miserable victims then confined in our gaols. This was caused by the death of a prisoner in the Fleet of the name of *Arne*, who had been confined for debt, and had expired under circumstances the most heartrending. The poet, after a compliment to the humanity of some humane individuals who, "touched with human woe," had searched into the horrors of the gloomy gaol," thus proceeds:—

. . . "Where sickness pines, where thirst and hunger burn,  
And poor misfortune feels the lash of vice.  
O great design! if executed well,  
With patient care and wisdom tempered zeal.

<sup>1</sup> 2 Lord Raymod, 1500.

<sup>2</sup> One contemporaneous account says,—“About seven in the morning he said faintly to his footman, who came into the room, ‘Who is that, Philip?’ A gentleman, coming to his bed-side soon after, called ‘Major! Major!’ but hearing no answer, drew open the curtains and found him weltering in his blood and just expiring. Mr. Green, a neighboring surgeon, was instantly sent for, but before he came the major was dead. He had made so deep a wound in his wrist with a penknife that he bled to death.”

<sup>3</sup> 17 St. Tr. 30—74; 2 Str. 766; 2 Ld Raym. 1485; 1 Burr. 178; Select Trials at the Old Bailey, ii. 153.



Ye sons of mercy! yet resume the search,  
 Drag forth the legal monsters into light,  
 Wrench from their hands oppression's iron rod,  
 And bid the cruel feel the pains they give."

In consequence, the affair was taken up by the House of Commons, who, after an investigation by a select committee, addressed the Crown, praying that John Huggins, the warden, and James Barnes, the deputy warden, of the Fleet, should be prosecuted by the Attorney General for the murder of Edward Arne.

The trial came on at the Old Bailey before Mr. Justice Page, when the jury returned a special verdict, finding "that while Huggins was warden, and Barnes deputy warden, of the Fleet, Arne was committed to that prison; that Barnes confined him in a cold, damp, unwholesome cell over the common sewer, knowing the same to be dangerous to life, and he kept him there forty days, *absque solamine ignis, necnon sine aliquâ matula, scaphis, vel aliquo alio hujusmodi utensili*;<sup>1</sup> that Arne died from this imprisonment; and that during his detention in the cell, Huggins was once present, saw him under the duress of the said imprisonment, and turned away without doing anything to relieve him." After the special verdict had been twice argued before the Judge, Lord Raymond delivered judgment:—

"In this case two questions arise:—1. What crime the facts found upon Barnes in the special verdict will amount to? 2. Whether the prisoner Huggins is guilty of the same offence with Barnes? As to the first question, it is very plain that the facts found upon Barnes do amount to murder in him. Murder may be committed without any stroke. The law has not confined the offence to any particular circumstances or manner of killing; there are as many ways to commit murder as to destroy man. Murder is where a man kills another of malice, so he dies within a year and a day; and malice may be either expressed or implied. Upon the facts found there is plain malice arising in construction of law. If a prisoner by duress of the gaoler comes to an untimely end, it is murder, without any actual strokes or wounds. The law implies malice in such a case, because the gaoler acts knowingly in breach of his duty. A prisoner is not to be punished in gaol, but to be kept safely. The nature of the act is such as that it must apparently do harm. It is also cruel, as it is committed upon a person who cannot help himself. So the charge of murder against Barnes is fully established. 3. The next question is, whether Huggins be guilty of the same offence; and the Judges are unanimously of opinion that upon the facts found he is neither guilty of murder or manslaughter. As warden, he shall answer for the acts of his deputy civilly, but not criminally. It nowhere appears in the special verdict, that he ever commanded or directed, or consented to, this duress of imprisonment which was the cause of Arne's death. The verdict finds that once the prisoner Huggins was present, and saw Arne *under the duress of the imprisonment, and turned away*;<sup>2</sup> but it by no means follows that he knew

<sup>1</sup> All indictments and special verdicts were still in Latin.

<sup>2</sup> "Sub duritie imprisonmenti prædicti et se avertit."



the man to be under this duress. We are told by the counsel for the Crown that if he saw the man under this duress he must know it, and it was his duty to deliver him. But we cannot take things by inference in this manner. The seeing him does not imply a knowledge of the several facts which make the duress, which consists of several ingredients and circumstances not to be discovered upon sight. If the evidence would have warranted it, the jury should have found that he knew and that he consented to what Barnes had done. *Malice* is an inference of law for the Court, but *consent* is a fact to be found by the jury. Then if the verdict be defective, we are pressed for a new trial; but, without determining the question whether after a special verdict in felony there may be a *venire de novo*, we are all of opinion that this verdict is not so uncertain as that judgment cannot be given upon it. The facts found are positively found; but, taken together, are not sufficient to make Huggins guilty of murder, and therefore he must be adjudged NOT GUILTY.”<sup>1</sup>

There is one other case of the same kind before Lord Raymond, which is worthy of notice. In the popular rage then prevailing against gaolers, Thomas Bambridge, a former warden of the Fleet, was indicted for the murder of Robert Castell, on the ground that he had confined him in a house in which there was a man lying ill of the small-pox, a disease which Castell had not had, and which he caught and died of. The indictment coming on for trial at the Old Bailey before Mr. Justice Page, Bambridge was easily acquitted on the evidence for the prosecution; but, instigated by a mobbish confederation, who subscribed large sums of money to gain their object, Mrs. Castell, the widow, sued out an “appeal of murder” against Bambridge, and likewise against Corbett, his deputy, who, in case of need, was to have been called as his principal witness. The appellees, instead of waging battle and defending themselves by their champions in the listed field, as they might have done, put themselves upon the country, and they were tried by Lord Raymond and a jury of London merchants. The prosecution was conducted with great zeal by Mr. Reeves, afterwards Chief Justice of the Common Pleas, and Mr. Lee, afterwards Chief Justice of the King’s Bench; and they contrived by dextrous management, to make out a sort of *prima facie* case. The appellees were ably defended by Serjeant Darnell and Serjeant Eyre, who both addressed the jury in their favor in long and eloquent speeches,<sup>2</sup> and, by calling witnesses, they made out a clear defence. Lord Raymond, in summing up the case to the jury, said,—

“This appeal by Mary Castell, for the death of her husband, is grounded on the doctrine that as the law has particular guards and privileges in justifying the right of a gaoler in detaining prisoners in safe custody, so on the other hand he must treat them humanely and put them into such places as do not prejudice their limbs and lives; for if they are put into such places and they die, this is murder. If a gaoler

<sup>1</sup> 17 St. Tr. 297—382; 2 Lord Raym. 1574.

<sup>2</sup> It was only upon indictments in the name of the King that, at common law, prisoners were deprived of the assistance of counsel in capital cases. If the proceeding was by appeal, the trial was conducted as if it had been a civil action.

brought bodies that were infectious into a room, so that a prisoner should catch a mortal distemper, or put him into irons by which he should die, the legal result is the same. Likewise if a gaoler will take persons that have not a distemper, and carry them to a room against their consent after notice given to him that such a distemper is there, it is at his peril. In the present case, gentlemen, these circumstances must be concurrent, that the deceased was carried to the house against his will; that the distemper was in the house; that the appellees had notice of the distemper being there; that, notwithstanding, he was carried and kept there, and that thereby he caught the distemper which was the occasion of his death."

He then went over the whole of the evidence, and showed that, with respect to Corbett, there was nothing to prove any knowledge of the distemper being in the house; and, with respect to Bambridge, that Castell had gone with him to the house voluntarily, and had made no complaint while there till he caught the infection. The jury found both appellees NOT GUILTY; but, from the popular prejudice against them, they had been in considerable jeopardy.<sup>1</sup>

I have now to present to the reader Lord Raymond sitting as judge on the trial of an information for libel. His authority has been mainly relied upon to support the doctrine that, in such a proceeding, the truth of the assertion of fact alleged to be libellous is wholly immaterial, and that libel or no libel is a pure question of law for the Court. The leading opposition journal of that day was the CRAFTSMAN, to which Pulteney, Bolingbroke, and the other antagonists of Sir Robert Walpole, were constant contributors. In No. 235, dated 2d of January, 1730-1, there appeared a letter which purported to come from a correspondent at the Hague, but which in reality was written by Bolingbroke in London, most bitterly inveighing against the foreign policy of the Government, and imputing very disreputable conduct to ministers in their negotiations with foreign states. This was particularly obnoxious to King George II., who was then engaged in deep political intrigues, with the view of adding a few acres to the electorate of Hanover; and, to please him, Sir Philip [A. D. 1731.] Yorke, the Attorney General, prosecuted Francklin, the printer and publisher, who was a bookseller in Fleet Street. "At the trial, a vast crowd of spectators of all ranks and conditions were assembled, and the court was crowded with noblemen and gentlemen. It was remarkable that Mr. Pulteney, presumed to be one of the patrons of the prosecuted paper, was loudly huzzaed by the populace in Westminster Hall, which shows the fondness of the people of England for the freedom of the press."<sup>2</sup>

The Attorney General contented himself with proving a preliminary

<sup>1</sup> 17 St. Tr. 383—462; 2 Str. 854. Notwithstanding this flagrant abuse of the proceeding of appeal of murder, it continued till the year 1819, when it was abolished upon Abraham Thornton throwing down his gauntlet on the floor of the Court of King's Bench, and demanding trial by battle, *ut vidi*. See 59 Geo. III. c. 46.

<sup>2</sup> Boyer's Political State of Europe, 1731.

avermert in the information respecting the existence of a treaty, and the purchase in the defendant's shop of a copy of the newspaper containing the Hague letter. Mr. Fazakerly, on the other side, contended that the case for the Crown was defective, because no evidence had been given to falsify the statements in the letter, which he could prove were true, and that, in reality, the jury ought to find that the letter was no libel, as it did not in any degree reflect upon the King, and only made fair observations on the conduct of his ministers:—

*Lord Raymond, C.J.*: “My opinion is, that it is not material whether the facts charged in a libel be true or false, if the prosecution is by information or indictment. There are legal remedies provided for every one who is injured, without scandalizing others. Above all, the character of a magistrate, minister of state, or other public persons, is to be protected. The law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the King to employ corrupt and incapable persons. Such charges tend to sow sedition and to disturb the peace of the kingdom. Therefore I shall allow no evidence to prove that the matters charged in the libel are true. If you think I am wrong, apply to the Court, and they will do you justice.” In summing up he said, “There are here three things to be considered, two of them being for the jury, and the third for the Court. 1. Did the defendant, Mr. Francklin, publish this Craftsman or not? 2. Do the expressions in the letter allude to the King and his ministers according to the innuendoes? These are matters of fact for your consideration of which you are the proper judges, and if you think in the affirmative on both questions, you will find a verdict of *guilty*. [A. D. 1725–1731.] There is a third question—whether these defamatory expressions amount to a libel or not? This belongs to the office of the Court, for it is a matter of law, of which the Court are the only proper judges. We are not to invade each other's provinces, as has been suggested of late by those who ought to have known better.”

The jury having found the defendant guilty of publishing the libel, he was sentenced to a year's imprisonment and to pay a fine of 100*l*.<sup>1</sup>

Lord Raymond's authority as a judge was so high that his decisions at Nisi Prius, when sitting all alone trying causes by jury, were reported, and settle many important points which, till then, were doubtful; as, that “a husband is not liable to be sued for necessities supplied to his wife if she has eloped from him with a paramour;”<sup>2</sup> that, “if goods which are not necessities are supplied to a minor, he is bound by a promise made after coming of age to pay for them;”<sup>3</sup> that, “if a man render services for which he would otherwise be entitled to be paid, he

<sup>1</sup> 17 St. Tr. 625—676. He was more lucky another time, when his acquittal gave rise to Pulteney's ballad—“Sir Philip well knows that his innuendoes,” &c. (See post, in Life of Lord Mansfield.) Looking to these exploded heresies, which then passed for gospel, it is curious to conjecture whether any, and which of the doctrines which are now reverentially cherished will be anathematized by posterity.

<sup>2</sup> *Morris v. Martin*, 1 Str. 647; *Manwaring v. Sands*, 2 Str. 706.

<sup>3</sup> *Southerton v. Whitlock*, 2 Str. 690.



cannot maintain an action for them if he rendered them to ingratiate himself in hopes of a legacy, although the party who receives them dies without leaving him anything ;”<sup>1</sup> and that, “ notwithstanding the old maxim, *pater est quem nuptiæ demonstrant*, the child of a married woman may be proved to be illegitimate by evidence that her husband could not have been the father of the child, although he was living within the four seas.”<sup>2</sup>

Lord Raymond was sworn a member of the Privy Council when made Chief of the King’s Bench ; and, as often as George I. or George II. went abroad, he was constituted one of the Lords Justices for the government of the kingdom in the King’s absence : but in these capacities he confined himself merely to going through formalities. He would take no active part in politics ; and, although he steadily voted for Sir Robert Walpole’s government, he never spoke upon any party question.

The only debate in which I can find that he ever mixed in the House [A. D. 1731.] of Lords was on the bill enacting that all legal proceedings should be conducted in the English language. I am sorry to say that he opposed it as a dangerous innovation, thinking that barbarous Latin should still be used to express a criminal charge in an indictment, the meaning of it being quite unintelligible to the party accused, whether illiterate or a good classical scholar. Lord Raymond ridiculed the supposed necessity for records being in the vernacular tongue, by observing that, “ upon this principle, in an action to be tried at Pembroke or Caernarvon, the declaration and plea ought to be in Welsh.” The Duke of Argyle courteously answered, that “ he was glad to perceive that the noble and learned lord, perhaps as wise and learned as any that ever sat in the House, had nothing to bring forward against the bill but a joke.”<sup>3</sup>

I have been able to discover very little of Lord Raymond in private life. He seems to have associated only with lawyers. He resided chiefly in Red Lion Square, then the seat of the legal aristocracy ;<sup>4</sup> and he had a country-house in Hertfordshire, where he bought a large estate. After a short illness, he died, in Red Lion Square, on the 15th of April, 1733, in the 61st year of his age ; and he was buried at Abbot’s Langley.

<sup>1</sup> *Osborn v. Guy’s Hospital*, 2 Str. 728.      <sup>2</sup> *Pendrell v. Pendrell*, 2 Str. 924.

<sup>3</sup> 8 Parl. Hist. 861. In palliation of Lord Raymond’s prejudice in favor of ancient absurdities, I may observe that I have heard judges in my own time lament the change then introduced, on the ground that although it might be material for the parties, both in civil and criminal proceedings, to have some notion of what is going on, the use of the law Latin prevented the attorneys’ clerks from being so illiterate as they have since become. I may likewise mention the ruling of a Welsh judge about thirty years ago, on a trial for murder, “ that the indictment and the evidence must not be interpreted into Welsh for the information of the prisoner, as that would be contrary to the statute of George II. which requires all proceedings to be carried on in the English language.”

<sup>4</sup> Such a change had been produced by the lapse of a century, that, to denote the inferiority of the class now to be found there, I have heard the comparison, “ as proud as a judge’s wife at a rout in Red Lion Square.”



At the east end of the parish church is to be seen a handsome marble monument of Lord Chief Justice Raymond, who is represented in a sitting posture, leaning upon a pile of books: in his right hand he holds a scroll, upon which is written "Magna Charta," his left is stretched out to receive a coronet, presented to him by [A. D. 1733.] a child; on his right hand sits a lady, in a mournful posture, holding over him a medallion, upon which is the head of a youth, carved in relief.

Under the shield containing his arms there is the following inscription:—

"OBLATOS HONORES FILII GRATIA ACCIPIT JUDEX ÆQUISSIMUS  
M. S.

Honoratissimi viri Roberti Raymond,  
Baronis de Abbot's Langley;

Cujus meritis raro exemplo respondit Fortuna;  
honesto enim loco natus,

literisque humanioribus primâ ætate excultus,  
universam juris scientiam, cui sese addixerat,  
tantâ ingenii facilitate complexus est,  
ut inter præcipuos causarum patronos

brevi tempore haberetur;

in quo munere exequendo,

cum pari fide solertiâ atque gravitate

indies magis magisque inclaruisset,

ad diversos juris honores gradatim ascendit;

donec augustissimorum principum Georgii I. et II. jussu

Capitalis Angliæ Justiciarius constitutus,

mox, ut uberiores virtutis suæ fructum caperet,

in amplissimum procerum ordinem

Cooptatus est."

He left behind him one son, by his wife, who was a daughter of Sir Edward Northey, Attorney General to Charles II.

The second Lord Raymond was not very distinguished, and I do not find him noticed except in the proceedings against Astley and Cave for printing an account of Lord Lovat's trial—when he was chairman of the committee to whom the matter was referred, and moved their commitment. He was married to a daughter of Lord Viscount Blundell, of the kingdom of Ireland; but, dying without issue, in the year 1756, the title became extinct.<sup>1</sup>

The Chief Justice's REPORTS<sup>2</sup> are the great glory of the family, and have obtained his introduction into Horace Walpole's Catalogue of Royal and Noble Authors, who describes him as "one of those many eminent men who have risen to the peerage from the profession of the law."<sup>3</sup>

<sup>1</sup> It is a curious fact that Lord Kenyon is the first ennobled Chief Justice of the King's Bench of whom there is a descendant now a member of the House of Lords.

<sup>2</sup> These Reports were first printed in 1743, and a second edition came out in 1745. The last edition, by Mr. Justice Bayley, with valuable notes, appeared in 1790. From the multiplicity of modern Reports, the old ones will probably never be re-printed.

<sup>3</sup> Works, vol. i. p. 245.

The warmest eulogium pronounced upon Lord Raymond is in the dedication to him of the Reports of Chief Baron Comyns. The eulogist, after describing the splendor of his reputation as supreme magistrate of the common law, adds—

“The difficulty of succeeding a person so truly eminent as your Lordship’s noble and learned predecessor was too apparent to all the world; but I may venture to add, with as much truth, that his Majesty (whose great regard and paternal affection for his subjects can appear in nothing more than so worthily filling the seats of justice) never gratified them in a more sensible manner than when he conferred that honor on your Lordship; for, however excellent great abilities and profound science are in themselves, however necessary to persons intrusted with the public sword of justice, they only become truly valuable to the rest of mankind when governed and directed by the rules of honor, virtue, and integrity.”<sup>1</sup>

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On the death of Lord Raymond, the office of Chief Justice of the King’s Bench remained vacant for several months. About the same time, Lord King, from severe indisposition, was obliged to resign the great seal, and the arrangements which, in consequence, became necessary caused great perplexity. At last it was settled that Mr. Talbot, the Solicitor General, should be Lord Chancellor; and, in Michaelmas Term, Sir PHILIP YORKE, the Attorney, took his seat as Chief Justice of the King’s Bench.

I ought now to describe his wonderful course, from the time when being an attorney’s *gratis* clerk he was sent to buy cabbages at the green grocer’s and oysters at the fishmonger’s for an imperious mistress, till he became Lord High Chancellor, an earl, and the renowned framer of our equitable code; but I have already, to the best of my ability, narrated his adventures, and drawn his character; and, upon reflection, I see no reason to retract or to qualify any of the praise or of the censure which I had ventured to mete out to him.<sup>2</sup>

It was thought that he would end his days as a common law judge, [FEB. 1737.] like Hale, Holt, and many of his most illustrious predecessors; but after he had presided in the King’s Bench little more than two years, Lord Talbot died suddenly, while still a young man; and Lord Hardwicke, being transferred to the woolsack, fulfilled his illustrious destiny.

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Much difficulty was experienced in fixing upon a successor to him in the Court of King’s Bench. From the earliest times, in each of the

<sup>1</sup> See Chalmers’s Biographical Dictionary, “Lord Raymond;” Kent’s Commentaries, 488.

<sup>2</sup> Lives of the Chancellors, vol. v. ch. cxxix.—cxxxvii. Since the first edition of my book, a Life of Lord Hardwicke, by Mr. Harris, has been published, in which complaint is made of me as often as I have ventured to doubt the propriety of anything that our hero ever did, said, wrote, or thought. But the “faultless monster” whom this author describes bears a very partial resemblance to Lord Hardwicke.

superior common law courts, a CHIEF had been constituted, with *puisnies* under him; for, with a perfect equality of rank among all the judges, a constant struggle would be carried on among them for ascendancy, the bar could not be duly kept in order, and the business would be thrown into confusion. But the full advantage of this arrangement can only be obtained when the Chief is superior to his brethren in talents and reputation. The condition of the court is very unseemly and inconvenient when the collar of S. S. is worn by one who feels that he does not deserve it, or who is considered by others inferior in authority to those who sit undecorated, by his side.

Lord Hardwicke, during the chancellorship of Lord Talbot, having been eclipsed in the House of Lords by the superior brilliancy of that extraordinary man, was supposed to be anxious to avoid the annoyance of having another law lord as a rival. Some applied to him the magiloquent comparison that he would

“Bear, like the Turk, no brother near his throne;”

and others, in homely but expressive language, said “he was resolved to *rule the roast*.”<sup>1</sup> He therefore cast his mantle on SIR WILLIAM LEE, who had been one of his *puisnies*, who was of decent character and respectable qualifications, who had no pretensions to a peerage, and who could never in any way be formidable to a chancellor. Although this selection was suspected to proceed from selfish motives, there is some doubt whether from the peculiar state of the bar at that time, a better could have been made: for there were serious objections to Willies, the Attorney General, on account of his profligate private life; and Ryder, the Solicitor General, had as yet very little weight or legal reputation. The honors of the profession may be considered a lottery; or if they are supposed to be played for,—in the game there is more of luck than of skill. At times we see a superfluity of men well qualified for high legal offices, while years roll on without a vacancy. At times, vacancies inopportunately arise when they cannot be reputably filled up. Sir William Lee had never dreamed of being more than a *puisne*, till the hour when it was announced to him that he was CHIEF JUSTICE OF ENGLAND.

He and his brother Sir George, like the two Scotts, Lord Eldon and Stowell, had the rare felicity of presiding at the same time over the highest common law and civil law courts in this country; for while Sir William Lee was Chief Justice of England, Sir George Lee presided as Dean of the Arches and Judge of the Prerogative Court of Canterbury. They were the sons of Sir Thomas Lee, of Hartwell, in the county of Bucks, Bart.

William, the younger, who was born in the year of the Revolution, (1688,) used often to say that “as he *came in with King William*, he was bound to be a good Whig.” He might have been called “Single-joke, Lee” for although highly honorable and respectable, he was the dullest of the dull throughout the whole course of his life; and this oft-

<sup>1</sup> Lond. Mag. 1737. He actually did *rule the roast* more than twenty years, sitting during all that time the only law lord in the House of Peers.

repeated pleasantry, with which he was in the habit of introducing his opinion on any controverted question of politics, was the only one which he was ever known to attempt or to relish.<sup>1</sup> Great astonishment was expressed by most of those who knew him at college when it was announced that he was destined for the profession of the law, and predictions were uttered that the would starve in it. But an old gentleman [A. D. 1700–1710.] who had been his tutor, and who knew what was in him, said, “I shall not—but you who are young may—live to see him Chief Justice of England, for to *plodding* and *perseverance* nothing is impossible.” The dull and despised William Lee did plod, did persevere, and did become Chief Justice of England.

In preparing for the bar, he mainly confined himself to special pleading, in which he took great delight. He never even had attempted to cross the “Ass’s Bridge,” so that he could not tell whether this would have proved an insuperable obstacle to his mathematical progress; and, though well drilled in the rules of prosody, he utterly and for ever renounced classics as soon as he had taken his bachelor’s degree at Oxford. Of modern literature he had not the slightest tincture. He felt no regret that he had lost an opportunity of being presented to Dryden. Instead of writing a paper in the *SPECTATOR*, like his contemporary and fellow law-student, Mr. Philip Yorke, he declared that he had never got further than the second number, where he was shocked “by the description of the idle Templar, who read Aristotle and Longinus, who knew the argument of each of the orations of Demosthenes and Tully, but not one case in the reports of our own courts, and whose hour of business was the time of the play, when crossing Russell Court and having his periwig powdered at the barber’s, he took his place in the pit of Drury Lane Theatre, exciting the ambition of the actors to please him.” It cost Lee no effort of self-denial to abjure such unprofitable pursuits. As it were, in the gratification of a natural instinct, he took to the *Liber Placitandi*; and, to fix it in his memory, he copied it over three times with his own hand. He luxuriated likewise in *Coke’s Entries*; and in perusing *Saunders’ Reports* he loved more to dwell upon the declarations, pleas, and replications, as there set out at full length, than the subsequent epigrammatic statements of the arguments and the decisions which have gained to the author the title of “The Terence of Reporters.” The fiction of “*giving colour*,” which had driven some very scrupulous pleaders from the bar, particularly charmed him; and, considering the rules of law to be founded either on the eternal fitness of things or on the revealed will of God, (a question which, it appears from his Diary, he was accustomed to dispute,) there was no dexterity sanctioned by these rules which he did not deem justifiable. At the same time he was an amiable, worthy man,—

. . . . “and if *astute* in aught,  
The love he had to *pleading* was in fault.”

We need not wonder that his fame went forth among the attorneys,

<sup>1</sup> According to this instance, Pope’s line ought to have been—  
“For gentle dullness ever loves ONE joke.”



and that soon after he was called to the bar he was in considerable practice—as a fabricator of sham pleas, and an arguer of special demurrers. His name appears frequently in the Reports as counsel in special pleading cases; but, though “to the manner born,” I must confess my inability to explain these mysteries to the profane.

There are only two cases on other subjects in which he is recorded as having been counsel while he remained at the bar. The first is *Rex v. Ivinghoe*, which came from the quarter [A. D. 1718.] sessions of his native county, and in which the question was, “whether a settlement was gained by a pauper who had been hired for a year by one master, and, with the consent of his first master, served part of the year under another?” This was quite adapted to Lee’s capacity, and he argued it as elaborately as if the rights and liberties of Englishmen had depended upon it. He succeeded, and was probably as much pleased with himself as Erskine on the acquittal of Hardy and Horne Tooke, for he induced that great sessions lawyer Lord Chief Justice Pratt to say, “If I lend my servant to a neighbor for a week or any longer time, and he goes accordingly and does such work as my neighbor sets him about, yet all this while he is in my service, and may reasonably be said to be doing my business. Therefore, I take this to be a service for the whole year under the first contract, and the settlement is at Ivinghoe.”<sup>1</sup>

Again, when the famous appeal of murder was sued out against Cambridge and Corbett, the mode of proceeding being almost [A. D. 1730.] obsolete, Lee, from his black-letter reputation, was employed to conduct it. The trial coming on, he addressed the jury at great length, and exerted himself very unscrupulously to obtain a conviction; but he met with a signal defeat, which made him [A. D. 1728.] vow that in future he would have nothing to do with facts, and would stick to law alone.<sup>2</sup>

When in his 40th year—an age when ambition is said to rage with greatest fury—he was much annoyed by an offer to be brought into the House of Commons, by the interest of his family, for Chipping Wycombe, in Bucks. He long strenuously refused, but, being told that if he persisted in doing so the seat would be carried by the Tories, he succumbed, observing that, “as *he came in with King William*, he was bound to be a good Whig.” However, we in vain look to see his name in the Parliamentary History; for while his brother George was a frequent and excellent speaker, and so became one of the leaders of the Leicester House party, no human power would have induced William to make a speech, unless he might wear his wig and gown and hold a brief in his hand. Although he voted steadily with the government, he would never, even in the lobby or in private society, give any better reason for the line he took than that “*he came in with King William*, and he was bound to be a good Whig.”

The next offer which was made to him he accepted without hesitation, and he became a Puisne Judge of the King’s Bench,—reaching the

<sup>1</sup> 1 Strange, 90.

<sup>2</sup> 17 St. Tr. 401.

summit of his ambition, and better pleased than he could conceive himself to be by winning a battle equal to *BLENHEIM*, or writing a poem more esteemed than *PARADISE LOST*. It was supposed, and said, that he had been promoted because he had so steadily proclaimed and proved himself to be "a good Whig;" but politics had nothing to do with the appointment. Sir Robert Raymond, then Chief Justice of the King's Bench, complained bitterly of the insufficiency of his *puisnies*, particularly in the knowledge of *special pleading*, of which he himself, notwithstanding his general juridical acquirements, was by no means master; and he made a particular application to Lord Chancellor King, that a vacancy which then occurred in the court might be filled up by Mr. Lee, [A. D. 1730.] who was more eminent in this line than any other man in the profession. Being coifed, sworn in, and knighted, the new Judge took his seat in the Court of King's Bench on the 15th of June, 1730.

He remained a Puisne Justice for seven years, under Lord Chief Justice Raymond and Lord Chief Justice Hardwicke, and was found exceedingly useful to them and to the public. Having concentrated all the energies of a mind naturally strong, and quickened by dialectical exercise, on one department of one science, he had attained in it to an unexampled skill. Moreover, its rules and analogies having a very extensive influence over the whole body of our law and procedure, few points arose in the course of a term on which his opinion was not valuable. He gave it with much modesty and discretion; not seeking to expose the ignorance of his brethren, or to parade his own knowledge, but setting the Chief Justice right by a whisper, and inducing a by-stander to believe, when the judgment was given, that they had all perceived how it must be from the first,—insomuch that he was likened, by the knowing, to the helm which keeps the ship in her right course, without itself attracting any notice.

Sir William Lee particularly gained the favor of Lord Hardwicke, and is called by Horace Walpole and other contemporary writers his "creature," his "tool," his "dependant," and his "shadow." Their great intimacy appears from Lord Hardwicke having employed Lee to assist him in bargaining for the estate in Gloucestershire from which he took his title, and to act as a trustee in his family settlements.<sup>1</sup>

Lord Hardwicke, on becoming Chancellor, was severely blamed for rewarding such services by promoting a man well qualified for the subordinate station which he occupied, but wholly unfit to be Chief Justice of England,—who, in addition to being a good special pleader, should be an enlightened jurist, experienced in the ways of the world, well qualified to address a legislative assembly, a scholar, and a gentleman.

No one can blame Sir William Lee for accepting the honor which was thrust upon him; and, public expectation being low, it was generally allowed that he acquitted himself very reputably. His intentions were ever most pure and upright; his temper was well disciplined; his manners were bland; and, although it could

<sup>1</sup> Harris's Life of Lord Hardwicke, i. 188.

not be said that he took an enlarged view of any subject, or did much to improve our code, his decisions between the parties litigating before him were substantially just.

On Monday, the 13th of June, being the fourth day of Trinity Term, 1737, he took the oaths and his seat as Lord Chief Justice in the Court of King's Bench. Subsequently to the Revolution, when judges actually did discharge their duty in an independent manner, they ceased to make any parading professions of their good intentions, and inaugural speeches had become obsolete. Lord Chief Justice Lee is said materially to have altered the opinion which the bar entertained, or at least expressed, of his law, by retaining a French cook, and giving frequent rounds of good dinners with copious draughts of claret and champagne.<sup>1</sup> He likewise had a villa at Totteridge, which still belongs to his family, where he used to entertain professional parties very hospitably, and tell them how he came in with King William. Dependents and flatterers clustered around him, and before he died he was praised as one of the greatest of Chief Justices.

His fame may have increased from his having had the good word of the fair sex; he certainly stood up for the rights of woman more strenuously than any English judge before or since his time. He had to decide "whether a female may by law serve the office of parish sexton?" and "whether females were entitled to vote at the election of a sexton?" John Olive and Sarah Bly were candidates for the office of sexton in the parish of St. Botolph in the city of London. She had 169 male votes and 40 female. He had 174 male votes and 22 female, and he was sworn in. The validity of the election coming on to be determined in the Court of King's Bench, the gentleman contended that all the votes for the lady were thrown away, as she was disqualified on account of her sex; and at any rate that he had a majority of lawful votes, as the female votes on both sides must be struck off from the poll, a woman being no more entitled to vote for a sexton than for a member of parliament or for a coroner, which Lord Coke says "they may not do although they have freeholds and contribute to all public charges—even to the wages of knights of the shire, which are to be levied *de communitate comitatus*." (4 Inst. 5 Reg. Brev. 192.)

*Lee, C. J.*: "I am clearly of opinion that a woman may be sexton of a parish. Women have held much higher offices, and, indeed, almost all the offices of the kingdom: as Queen, Marshall, Great Chamberlain, Great Constable, Champion of England, Commissioner of Sewers, Keeper of a Prison, and Returning Officer for members of parliament.<sup>2</sup> 2. As to the second point, it would be strange if a woman may herself fill the office, and yet should be disqualified to vote for it. The election of

<sup>1</sup> He was in the habit of particularly praising the precept of Lord Burleigh to his son "to keep an orderly table!" by which he understood *a table covered with good dishes set out in orderly fashion*.

<sup>2</sup> Spelman's Glossary, 497.; 3 Keble, 32.; Blunt's Tenures, 47.; Dyer, 285.; Hob. 148.; Brady's History of Boroughs. Lady Packington was relieving officer at Aylesbury; and the famous Countess of Pembroke, being hereditary sheriff of Westmoreland, attended the judges in that capacity at the assizes.



members of parliament and of coroner stands on special grounds. No woman has ever sat in parliament or voted for members of parliament, and we must presume that when the franchise was first created it was confined to the male sex. There was no reason for such a restriction respecting the office of sexton, whose duties do not concern the morals of the living, but the interment of the dead. The female votes being added to the poll, Sarah Bly has the majority, so that she, and not John Olive, is now the lawful sexton of this parish."

The Puisnies concurring, judgment was given in her favor.<sup>1</sup>

I do not find any other cases which came before him in the King's Bench so fully reported, but, from short notes in Strange, we find that he decided several important points—as that "it is a misdemeanor to take a young lady out of the care of a guardian appointed by the Court of Chancery, and to marry her, although she goes away voluntarily;"<sup>2</sup> that "it is a misdemeanor to keep gunpowder where it may be dangerous to the King's subjects;"<sup>3</sup> that "it is actionable to say of a justice of the peace, in the execution of his office, that *he is a rogue*;"<sup>4</sup> that "at common law a factor, although empowered to sell, cannot pledge the goods consigned to his care"<sup>5</sup> that "if a ship, insured in time of war against all perils except capture, sails on the voyage and is never heard of, it shall be presumed that she foundered at sea, so as to make the underwriters liable;"<sup>6</sup> that "an action lies for keeping a dog, known by his master to be accustomed to bite men, whereby the plaintiff was bitten, although the damage arose from the plaintiff having accidentally trod upon the dog's toes;"<sup>7</sup> and "that a pardon being pleaded to an indictment for murder, after a special verdict found, the prisoner is entitled to be discharged without finding sureties to abide an appeal by the heir of the deceased."<sup>8</sup>

Lord Chief Justice Lee presided at the special commission which sat for the trial of those who had taken part in the rebellion of 1745. Under an act of parliament which authorized the Government to prosecute them in any county of England, a Court, attended [JULY, 1746.] by all the Judges, assembled at St. Margaret's Hill, in the borough of Southwark. Most of those who were to be tried had been engaged in the siege of Carlisle, and had surrendered to the Duke of Cumberland. The charge to the grand jury was given by Lee, who fully explained to them how they, in Surrey, came to have cognizance of offences committed in a distant part of the kingdom, and laid down to them very distinctly the doctrine of compassing the King's death and of levying war against him.

The indictments found against the Earls of Kilmarnock and Cromartie, and Lord Balmerino, were immediately removed by *certiorari* to the

<sup>1</sup> 2 Str. 1114. *Same Case*, MS. Taking the converse of Lee's rule, a woman may be a Director of the East India Company, as she is entitled to vote for that office.

<sup>2</sup> *Rex v. Lord Ossulston*, 2 Str. 1107.

<sup>4</sup> *Kent v. Pocock*, ib. 1168.

<sup>6</sup> *Green v. Brown*, ib. 1199.

<sup>8</sup> *Rex v. Chetwynd*, 18 St. Tr. 289.

<sup>3</sup> *Rex v. Taylor*, ib. 1167.

<sup>5</sup> *Patterson v. Tash*, ib. 1178.

<sup>7</sup> *Smith v. Polack*, ib. 1264.



House of Peers,—but those against commoners were proceeded with before Surrey juries as expeditiously as the forms of law would permit.

The first case taken was that of Colonel Francis Townley, the representative of an ancient family in Lancashire, who, entering the French service had distinguished himself much at the siege of Philippsburgh and on various other occasions, and who still held a commission from the King of France when he joined the army of the Pretender. He set up two defences. The first was, that he ought to be treated as a prisoner of war and not as a traitor, for he had acted under the authority of a foreign sovereign, who was making open war against the crown of Great Britain,—therefore, instead of being executed for high treason, he was entitled to be exchanged under the cartel lately established between the two countries, according to the usages of honorable hostilities. 2dly: At all events, if he were still liable to be treated as an English subject, he claimed the benefit of the articles of the capitulation of Carlisle, signed by the Duke of Cumberland, engaging that, on the surrender of the city, the prisoners taken in arms “shall not be put to the sword, but be reserved for the King’s pleasure,”—amounting, as he contended, to a solemn pledge that their lives should be spared, and, therefore, barring any capital proceedings against them.

*Lee, C. J.:* “Neither defence can avail:—1. The prisoner is a native-born subject of this realm, and cannot free himself from the allegiance which he owes to his own sovereign by entering into the service of a foreign state. Our law says, *Nemo potest exuere patriam*. The very fact relied upon that the prisoner is in the service of France, a country with which we are now at war, is an *adherence to the King’s enemies*, and an overt act of high treason. 2. The second defence we could give no effect to here, and it could only be made the foundation of an appeal to the Crown to withdraw a prosecution which ought not to have been instituted; but, as it has been brought forward, I think I am bound to say that, in my opinion, there is no foundation for it in reason, justice, or honor. The only fair meaning of the words relied upon is, that the prisoners should not immediately be put to death by martial law as rebels taken in arms, but should have the benefit of a fair trial according to our humane forms of procedure before the Judges of the land.”<sup>1</sup>

The prisoner was, of course, found guilty; and, to show the customs and feelings of Englishmen in the middle of the last century, I add a short cotemporaneous account of his execution, which was read then without any wonder or any disapprobation:—“After he had hung six minutes he was cut down, and, having life in him as he lay upon the block, to be quartered, the executioner gave him several blows on his breast, which not having the effect designed, he immediately cut his throat; after which he took his head off; then ripped him open, and took out his bowels and heart, and threw them into a fire, which consumed them; then he slashed his four quarters, and put them with the

<sup>1</sup> A mighty small benefit, certainly; as, if tried for treason they could not have the remotest chance of escape, and it would have been better for them to have been shot, than hanged, embowelled while yet alive, beheaded, and quartered.

head into a coffin, and they were carried to the new gaol in Southwark, where they were deposited till August 2, when his head was put upon Temple Bar, and his body and limbs suffered to be buried." Chief Justice Lee, and five other Judges, in the discharge of their duty signed the warrant by which these revolting cruelties were authorized.<sup>1</sup>

The next trial in which any question of law arose was that of *Alexander M'Growther*, a lieutenant in the Duke of Perth's regiment, which had formed a part of the Pretender's army. The prisoner stated, by way of defence, "that he was a vassal of the Duke of Perth; that he was bound to obey the orders of his superior; that, nevertheless, having refused to do so, the Duke of Perth had threatened to burn his house to the ground, and to lay waste all that belonged to him, if he would not enter into the rebellion." He accordingly called four witnesses, who deposed to those threats, adding "that the Duke's men had begun to bind him with cords before he enlisted; that he yielded, to save himself from ruin; and that by the custom of the country the vassal is considered bound to execute the orders of his superior, whatever they may be."

*Lee, C. J.*: "We cannot hear of any such custom. The King's subjects owe allegiance to the King alone, and are bound only to obey the law. There is not, nor ever was, any tenure which obliges tenants to follow their lords into rebellion. And as to the matter of force, the fear of having houses burnt or goods spoiled, or a slight injury to the person, is no excuse in the eye of the law for joining and marching with rebels. The only force that excuses is, a force leading to present fear of death, and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual overruling force, and that he quitted the service of the rebels as soon as he could,—according to the rule laid down in *Oldeastle's Case*, 1 Hale, 50, that the prisoner joined *pro timore mortis et recessit quam cito potuit*. But here the prisoner pretends to prove force only on the 8th of August, and he continued with the rebels and bore a commission in their army till the surrender of Carlisle on the 30th of December.

The jury, without going from the bar, found a verdict of *guilty*. This prisoner, however, was reprieved, and afterwards pardoned.<sup>2</sup>

Alexander Kinloch and Charles Kinloch having pleaded *not guilty*,—after their trial upon this plea had begun, insisted that they were entitled to be acquitted, because they were native-born Scotchmen, and by the articles of union between Scotland and England, Scotland was to retain

<sup>1</sup> 18 St. Tr. 329—352.

<sup>2</sup> Foster says,—“Many of the Scotch prisoners made the like defence, and the same directions in point of law were given. The matter of fact, whether force or no force, and how long that force continued, with every circumstance tending to show the practicability or impracticability of an escape, was left to the jury on the whole evidence.” (Foster, ch. ii. s. 8.; East's Pleas of the Crown, ch. ii. s. 15.; 18 St. Tr. 391—394). See likewise the trial of Fergus M'Ivor and Evan Dhu M'Combie, which took place at Carlisle a few weeks after. (3 Waverly, 300.)

her own laws, so that they ought to be tried by the Court of Justiciary in Scotland. The Judges ruled that this objection, if well founded, could only be taken advantage of by plea in abatement to the jurisdiction of the Court; and, in favor of life, they allowed the jury to be discharged, the plea of *not guilty* to be withdrawn, and the plea in abatement to be substituted for it. To this the Attorney General demurred, and the point was argued at great length:—

*Lee, C. J.*: “We are all of opinion that the birth, residence, and apprehension of the prisoners in Scotland are facts perfectly immaterial in the present case. So it would have been even at common law; for at common law every man is triable, not where he was born, resided, or was apprehended, but where the offence was committed. Moreover, we are now sitting under a special act of parliament which gives us jurisdiction in all treasons without any distinction of persons or localities.”

The plea in abatement being overruled, the prisoners again pleaded *not guilty*; and, being tried by another jury, were convicted on clear evidence, for they had taken a very active part in the Pretender’s invasion of England. But they moved, in arrest of judgment, that the conviction was unlawful, as the Court had no power, even with their consent and at their request, to discharge the first jury; and that being once given in charge to that jury, they could not lawfully be tried by any other. When the question was argued before the twelve Judges, the counsel for the prisoners gave instances in which the assumed power of discharging the jury, after the commencement of the trial, had been abused to the oppression of the subject; and relied upon a *dictum* of Lord Holt, that “in criminal cases a juror cannot be withdrawn but by consent, and in capital cases it cannot be done even with consent.”

*Lee, C. J.*: “With the exception of my brother Wright, we are all of opinion that the conviction is regular, and that sentence of death must be passed upon the prisoners. The rule that a trial once begun must proceed to a conclusion before the same jury, cannot bind in cases where it would be productive of manifest injustice or great hardship to the prisoner. In the present case, the objection urged by the prisoners of our want of jurisdiction might have turned out to be well founded; but it could not have been taken advantage of under the plea of *not guilty*. Liberty was therefore given to them to withdraw that plea. When withdrawn, the jury had no issue to try, and must therefore of course be discharged. Consequently they have no right to complain of that which was a necessary consequence of an indulgence shown them by the Court. The authority of Lord Holt is high; but Lord Hale says, “In case a man in a phrensy happen by some oversight to plead to his indictment, and put himself upon his trial, and it appeareth to the Court upon his trial that he is mad, the judge in discretion may discharge the jury, and remit him to gaol, to be tried after the recovery of his understanding.”

*Wright, J.*: “I admit that the discharging of the jury in the present case was an instance of great indulgence to the prisoners; but I think it is safer to adhere to a general rule, than on any account to establish a power in judges which has been grossly abused and may be again. The



policy of the law of England, and, indeed, the true principles of all government, will rather suffer many private inconveniences than introduce one public mischief. I consider the trial by the same jury which is sworn and charged with the prisoner as part of the *jus publicum*, as a sacred *depositum* committed to the judges which they ought to deliver down inviolate to posterity."

The usual sentence in cases of high treason was accordingly passed upon the prisoners, but the difference of opinion in the Court saved their lives, and they were pardoned on condition of being sent abroad.<sup>1</sup>

The last trial under this special commission was that of Sir John Wedderburn. The Government had resolved to make an example of a *non-combatant*, and indicted him for high treason, although he had not mounted the white cockade, and he never carried any arms but a small sword, then worn by every private gentleman. But it was proved that he accepted the appointment, under the Pretender, of collector of excise, and that accordingly he did collect the excise in several places where the rebel army lay. His counsel objected that this evidence did not support the indictment; but Lord Chief Justice Lee declared the opinion of all the Judges, that collecting money for rebels is an overt act of high treason. The prisoner was convicted, and executed as a traitor on Kennington Common.<sup>2</sup>

When the rebel peers were tried before the House of Lords, Chief Justice Lee and the other Judges attended as assessors, but only one point of law was referred to them,—“whether the dates given to the overt acts of treason in the indictment were material?”—and Lee, as the organ of his brethren, explained to the astonished Scotch this mystery of English procedure, that “time and place must be laid in the indictment with certainty, but that evidence may be admitted to prove the offence to have been committed at any other time or any other place within the same county.”<sup>3</sup>

Lord Chief Justice Lee, notwithstanding his defective elocution and [A. D. 1752.] very limited acquirements, got on pretty well in the discharge of the duties of his high office, till he broke down in the trial of a prosecution for libel ordered by the House of Commons; after which he lost all authority, and experienced constant mortification. William Owen, a bookseller, having published a pamphlet which severely and justly censured the conduct of the House of Commons in committing to Newgate the Honorable Alexander Murray because he refused to fall down on his knees before them, an address to the Crown was carried, with a foolish unanimity, that the Attorney General should be directed to prosecute the publisher. Sir Dudley Ryder accordingly filed a criminal information against Owen, and, at the trial, insisted that he was entitled to a verdict of *guilty* on merely proving that a copy of the pamphlet had been sold by the defendant. But he was encountered by

<sup>1</sup> 18 St. Tr. 395-416.

<sup>2</sup> Ibid. 425. When a boy I knew his son, who was called Sir John Wedderburn, although the baronetcy had been forfeited by the attainder. He too had been “out in the ’45,” and he told very marvellous stories of his adventures.

<sup>3</sup> 18 St. Tr. 442-858.



Pratt (son of the Chief, and afterwards Lord Camden), who strenuously insisted that as, in an indictment for an assault with intent to ravish, the *intention* must be proved, or there must be an acquittal, so here the jury must consider whether the *intention* of the writer was to defame the representatives of the people, or, by exposing and correcting their errors, to render them more respectable and useful?

The Chief Justice was much shocked by this doctrine, but he had not the art which enabled Lord Raymond to combat it successfully, and which was afterwards exhibited more strikingly by Lord Mansfield against the publishers of JUNIUS. In summing up, without attempting to take off the effect of the popular arguments urged for the defendant, he drily said, "The publication of the pamphlet being thus proved, and, indeed, not being denied by the defendant, I am of opinion that you are bound to find him *guilty*. I have ever supported the principles of liberty established at the Revolution, but I must keep juries to questions of fact.<sup>1</sup> Whether the pamphlet be a libel, is a matter of law; if it be not, the defendant might have demurred to the information, or may, after your verdict of *guilty*, move an arrest of judgment or bring a writ of error." The jury withdrew, and when they returned, after having been absent two hours, the following scene was enacted:—

*Clerk of the Court*: "Gentlemen of the jury, are you agreed on your verdict? Is the defendant guilty or not guilty?" *Foreman*: "GUILTY!" *Chief Justice*: "You could not do otherwise." *Juryman*: "No! no! my Lord! it is all a mistake,—we say NOT GUILTY." *Foreman*: "Yes, my Lord, it was a mistake; I meant to say NOT GUILTY." *Bystanders*: "Huzza! Huzza!! Huzza!!!" *Attorney General*: "My Lord, this must not be; I insist on the jury being called back and asked their opinion upon the only question submitted to them." *Chief Justice*: "Gentlemen of the jury, do you think the evidence laid before you of Owen's publishing the book by selling it is not sufficient to convince you that the said Owen did sell this book?" *Foreman*: "NOT GUILTY! my Lord, NOT GUILTY!" *Juryman*: "Yes, my Lord, that is our verdict, and so we say all." *The rest of the Jury*: "So we say all, so we say all."

There was a prodigious shout of applause in Guildhall, and at night there were bonfires in the streets to celebrate the triumph over an unpopular House of Commons.<sup>2</sup>

A degree of ridicule was now attached to Lee's name, and he found his position very uncomfortable; for not only would juries often find verdicts contrary to his direction, but the bar paid little deference to him, and even his *puisnies* were too apt to show that they considered themselves his betters.

Some legal chroniclers, not familiar with official usages, have said that under these circumstances, like his predecessors in the reigns of Charles I.

<sup>1</sup> I am surprised he did not inform them that "he came in with King William, and therefore had always been a good Whig."

<sup>2</sup> 18 St. Tr. 1203; post, Life of Sir Dudley Ryder.

and James I., he meant to quit law for politics, and that he accepted the office of Chancellor of the Exchequer. This fact is literally true. The seals of Chancellor of the Exchequer were indeed handed over to him [MARCH 3, 1754.] on the 3d of March, 1754, and they remained in his possession till within a few days of his death. He was appointed, however, only under the immemorial custom that when the office of Chancellor of the Exchequer suddenly becomes vacant, and a difficulty arises about effectively filling it up, it is nominally held *ad interim* by the Chief Justice of the King's Bench for the time being, who does the formal acts necessary for the progress of business in the Exchequer. On the sudden death of Mr. Pelham, Lord Chief Justice Lee held the seals of Chancellor of the Exchequer till the nomination of Mr. Legge; but in this capacity he never did anything more than sign his name or seal a writ, and the Duke of Newcastle had as little thought of introducing him into the new Cabinet as of making him Archbishop of Canterbury.<sup>1</sup>

The time was at hand when Lee was to be freed from the irksomeness of his position by being transferred to a better world. His health and spirits having been some time declining, on the evening of Wednesday, the 3rd of April, 1754, he was struck with apoplexy, and, early in the morning of Monday, the 8th of the same month, he expired, in the sixty-sixth year of his age, and the seventeenth of his Chief Justiceship. He was buried at Hartwell, where a handsome monument has been erected to his memory.

There have been recently given to the world very copious extracts from a sort of diary that he kept, under the title of "Miscellanea," and from entries made by him in a succession of almanacs which he carefully preserved;<sup>2</sup> but these are perused with much disappointment. They might have contained some lively sketches of his own adventures, and some amusing anecdotes of his contemporaries, although we could not have expected in them much profundity of thought or brilliancy of fancy; but they consist chiefly of legal antiquities with which almost every one is quite familiar, and of dull observations on dull books which he had read.<sup>3</sup> He seems to have been a believer in the old theory of medicine founded on *radical heat* and *radical moisture*, and to have paid great

<sup>1</sup> One learned author has even suggested that the fact of Lee "filling the office of Chancellor of the Exchequer as well as of Chief Justice might have been the reason of his remaining a Commoner;"—as if he had been in the habit of opening the Budget in the House of Commons. (Harris's *Life of Lord Hardwicke*, iii. 517.)

<sup>2</sup> *Law Magazine*, xxxviii. 217, xxxix. 62.

<sup>3</sup> There are some historical notices likewise, showing that my Lord Chief Justice was very little acquainted with events which had happened before his own birth and *the coming in of King William*; e. g. "It appears by the letters of D'Estrade that Lord Clarendon advised the sale of Dunkirk, and that Lord Clarendon was also extremely averse to the Presbyterians, who by that history appear to have behaved very well, and to have been for the Restoration." He thinks it was unknown, before the publication of these letters, that Lord Clarendon had anything to do with the sale of Dunkirk, or behaved with ingratitude and bad faith to the Presbyterians.

attention to the directions of almanac-makers respecting diet and blood-letting. Thus he says, under date "October, 1737.—Dr. Cheney told me that the Bath waters were the best remedy he knew for the stomach, or for vapors arising from too great coldness of blood; and wherever there was not sufficient *calidum naturale*, he knew no outward help equal to them. He laid down the rule that to hot blood cooling waters should be applied." His almanac was "Rider's British Merlin, adorned with many delightful and useful verities, fitting all capacities in the islands of Great Britain's monarchy; with notes of husbandry, &c. Compiled, for his country's benefit, by Cardanus Rider." The following very wholesome precepts of this sage were particularly valued by the Chief Justice;—"It's hurtful to fast long. Use meats that are moderately hot; for the best physic is warm diet, warm clothes, and a merry, honest wife. Consult with your tailors as well as physicians. Let a warm fire, and a cup of generous wine or good October beer, be thy bath; the kitchen thy apothecary's shop; hot meats, and broth, thy physic; and a well-spread table the proof of thy charity to thy poor neighbor."

Notwithstanding all these precautions, he was very nearly cut off when attending the Old Bailey Sessions, in May, 1750. The gaol fever then raged in Newgate, as in other prisons, and (what was no uncommon occurrence in those times) it was communicated, by the prisoners brought into court for trial, to the judges, the jurymen, and the witnesses. He escaped, though exposed to the contagion; but Mr. Justice Abney, and many others, perished. He made a sharp remonstrance to the Lord Mayor and aldermen of London, and preventives were introduced which are still kept up at the Old Bailey—such as fumigating the court several times a day by means of a hot iron plunged in a bucket filled with vinegar and sweet-smelling herbs.<sup>1</sup>

Valuing above all things "a merry, honest wife," soon after he had lost his first—Anne, daughter of John Goodwin, Esq., of Burley, in the county of Suffolk,—he married, secondly, Margaret, daughter of Roger Drake, Esq., and relict of James Melmoth, Esq., who, on the authority of Lord Hardwicke, was "an agreeable lady, with 25,000*l.* fortune."<sup>2</sup> But he himself records this event with wonderful brevity, for, in his almanac for 1733, after writing "Six bushels of oats for four horses per week; hempseed good in their corn; walking them in the dewy grass in the morning, very good: for rheumatism, elder tea,"—he only adds these words: "I MARRIED TO MRS. M. M." (meaning Mrs. Margaret Melmoth). He lived happily with her till May, 1752: but he makes no further mention of her, living or dead.

It may alarm some who complacently exult in their present consequence, and confidently calculate on enjoying a lasting reputation, to know that Chief Justice Lee not only considered himself, but was considered by many in his own day, to be a great man. He was frequently a *dedicatee*, and the *dedicators* ascribed to him every virtue under heaven. Even after his death, when he could no longer give away master-

<sup>1</sup> Gentleman's Magazine, xx. 333.

<sup>2</sup> Harris's Life of Lord Hardwicke, i. 233.

ships or clerkships, nor encourage nor frighten young barristers by his smile or his frown, thus wrote Sir James Burrow—a very able man, afterwards the reporter of Mansfield:—

“He was a gentleman of most unblemished and irreproachable character, both in public and in private life; amiable and gentle in his disposition; affable and courteous in his deportment; cheerful in his temper, though grave in his aspect; generous and polite in his manner of living; sincere and deservedly happy in his friendships and family connexions; and to the highest degree upright and impartial in the distribution of justice. He had been a Judge of the Court of King’s Bench almost twenty-four years; and for near seventeen had presided in it. In this state the integrity of his heart and the caution of his determination were so eminent, that they probably never will, perhaps never can be, excelled.”<sup>1</sup>

Sir James has been laughed at for concluding with this anti-climax:—“He was peculiarly master of that sort of knowledge which respects the settlement of the poor;” but I doubt very much whether the legal hero thus extolled would not himself have been gratified by the panegyric.

Lord Chief Justice Lee is now represented by his great-grandson, the very learned civilian, Dr. Lee, who has inherited Hartwell and the other large estates of his family.<sup>2</sup>

<sup>1</sup> Burrow’s Settlement Cases, p. 328, 4to. 1768.

<sup>2</sup> Since I finished the above little memoir, by the kindness of Dr. Lee (for which I am most grateful) I have had an opportunity of perusing all the Chief Justice’s MSS., amounting to above 100 volumes; but I have been unable to extract any thing from them for the instruction or amusement of the reader. They prove the extraordinary industry of the compiler during the whole course of his long life. His common-place book is stupendous, and he had digested reports of an immense number of cases decided while he was a student and at the bar. Beyond his own profession he appears to have had some taste for metaphysics, and he copies passages from Locke, Hobbes, and Bishop Berkeley; but in the whole mass I can find nothing original, either grave or gay. His note-books from the time he was made a judge, both in civil and criminal trials, are extant without any incident being recorded in them, or any remark being made on the counsel who pleaded before him. None of the letters he received are preserved, and there is the draught of only one letter written by him. This was to Lord Hardwicke, and describes the writer’s growing infirmities:—“As to my present state of health,” says he, “it is but low, and I cannot walk at all without help. What my future condition will be, God only knows. But as long as I exist I trust and hope the consciousness I have of your Lordship’s judgment and integrity will remain; and may your counsels long, very long, flourish, is the most sincere wish of your Lordship’s most humble servant, W. LEE.”



## CHAPTER XXVII.

## LIFE OF CHIEF JUSTICE RYDER.

I HAVE one other dull Chief Justice of the King's Bench to take in hand, but I am comforted by the recollection that he was immediately succeeded by the most accomplished Common Law Judge who presided in Westminster Hall during the eighteenth century. Although SIR DUDLEY RYDER was eminent in his profession, as well as a man of spotless character, his career was without any stirring incidents; he was not distinguished either in literature or politics, and his intimacies were chiefly with men as insipid as himself. Unluckily for his biographer, he not only never excited much admiration in public life, but he did no act deserving of severe censure, and nothing dishonorable was even imputed to him. Yet I cannot pass over in silence a man who filled the important office of Attorney General much longer than any of his predecessors or successors, who was for many years the colleague of Mansfield, who ranks among the Chief Justices of England, whose patent of peerage was signed when he was suddenly snatched away, and whose death produced a very memorable crisis in the party history of our country.

The Ryders are all said to be descended from the ancient family of Rythre, which was seated for many ages at Rythre, in the hundred of Barkston, in the county of York; but the line we are considering cannot be distinctly traced higher than the Reverend Dudley Rider, who, in the beginning of the seventeenth century, was a nonconformist minister at Bedworth, in the county of Warwick. Although a zealous Puritan, he was not without worldly ambition; and he prophesied that in his descendants the name of Ryder would recover and exceed its ancient splendor. He did not live to see the fulfilment of this prophecy, but one of his grandsons was Archbishop of Armagh, and another was Chief Justice of England. In the first generation after him there was no appearance of such an elevation, for his two sons, John and Richard, were both tradesmen. John, the father of the Irish Primate, kept a haberdasher's shop at Nuneaton, in Warwickshire. Richard, the father of the Chief Justice, was a mercer in West Smithfield, in the city of London. A love of learning, however, was still hereditary in the family, the Reverend Dudley's library was divided among his descendants, and they were remarkable for intelligence as well as sobriety of manners.

Sir Dudley, whose career we are now to follow, was the second son of the mercer, and was born in the year 1691. He is the first Englishman I read of who laid the foundation of future eminence at a Scotch University; being in due time to be followed by an illustrious band of successors, including Lord Melbourne and Lord John Russell. After a tolerably good school education at a dissenting academy at Hackney, he studied some years at Edinburgh, which was then rising into celebrity

from the eminence of its professors. Being destined to the profession of the law, he followed the custom, which he found then almost universal among Scotchmen who were to pass as advocates, of going to Leyden to be initiated in the Roman civil law. Both there and at Edinburgh he enjoyed the opportunity, which was still much prized by his family, of having the Gospel preached and its rites administered in true Genevese presbyterian purity. When mixing in after life with those who had been bred at the English public schools and the English Universities, and who were perpetually talking of these seminaries as if there were no valuable knowledge to be acquired elsewhere in the world, he sometimes regretted, for the sake of being on an equal footing with them in conversation, that he had not fagged or been fagged by some of them at Eton, nor joined in their boasted bacchanalian exploits at Oxford; but he felt that he had amassed a greater stock of valuable knowledge than most of them, and that, having lived with those who like himself were a little pinched by penury, he had acquired habits of reflection, of self-denial, and of persevering industry which would enable him to outstrip those who for the present superciliously affected a superiority over him.

After entering as a student at the Temple, notwithstanding his high veneration for the memory of his grandfather, the [MAY 8, 1719.] Puritan pastor, he joined in communion with the Episcopalians, being of opinion that forms of ecclesiastical government were left by our Blessed Saviour to be adapted to the exigencies of different societies, and that the enlightened and tolerant Church of England, respected and beloved by the great majority of the inhabitants of this country, was then to be preferred to the Presbyterian persuasion, which had fallen off both from the orthodoxy and the learning which had distinguished it in the times of Calamy and Baxter.<sup>1</sup>

Having been called to the bar by the Society of the Middle Temple, [JULY 8, 1725.] he soon afterwards transferred himself to Lincoln's Inn. In due time he was elected a Bencher and Treasurer of this Society, and he became much attached to it.<sup>2</sup> Although from his first start he was always advancing, so noiseless was the tenor of his way that we read little more respecting him till he was about to be appointed a law officer of the Crown. His rise was chiefly to be ascribed to the friendship of Lord King, who, like him, was the son of a tradesman, had studied at Leyden, had been brought up among Dissenters, and, taking to the profession of the law, had conformed to the Established Church. By this powerful patron he was introduced to Sir Robert Walpole, who had the sagacity to discover his serviceable merit, and resolved to employ him.

<sup>1</sup> The English Presbyterians were then passing through Arianism to the Socinianism or Rationalism which they reached about the middle of the 18th century.

<sup>2</sup> It appears from the books of Lincoln's Inn, that he was admitted of that Society, Jan. 26, 1725; invited to the Bench, Jan. 23, 1733; elected Treasurer, Nov. 28, 1734; and made Master of the Library, Nov. 28, 1735. The last council he attended was on Feb. 12, 1754.

Accordingly, in the move which took place on the promotion of Talbot and Yorke to be Chancellor and Chief Justice of the King's Bench, Ryder was made Solicitor General. [Nov. 1733.]

I do not recollect any lawyer of great eminence whose early career presents such a blank. There is no tradition of any great speech by which he forced himself into business, or of any vicissitudes of good or evil fortune which he experienced. Even when promoted to his present office, we know little of his companions or of his mode of life. One friendship he had, with Mr. Bowes, a brother barrister, who, having accompanied West, the Irish Chancellor, as secretary, was called to the bar in Ireland, and, having been successively Solicitor General, Attorney General, and Chief Baron in that island, at last himself became Irish Chancellor and an Irish peer. A constant epistolary correspondence was kept up between them. Bowes's letters are preserved, and some of them are very curious. The first which I select was written soon after his arrival, and gives an amusing account of the manners of Dublin—a city which was then as distant from London as New York now is. A lawyer is particularly struck by perceiving that, for advancing a favorite, practices were formerly permitted in our profession which with us would be reprobated, and which, if attempted, would be very injurious to the person intended to be benefited.<sup>1</sup>

“Dublin, Oct. 9, 1725.

“Dear Sir,—It is four weeks since I arrived here, in which time you might expect a tolerable account of the success of my project; but, in fact, I am as incapable of forming a judgment on that head as when I first came on shore.

“When I tell you the people here are French in all respects but their language, you will admit I ought not to depend upon general civilities. In England a man might flatter himself with success from a like reception, but here time only can disclose the event of this undertaking. I am, indeed, retained in upwards of twenty causes, the fees of which I have placed on the debtor side of my account with the Chancellor, for I consider them as compliments paid to him, and as to myself hope they will prove the means of showing me in business. Though I cannot appear in business till I am called to this bar, yet I constantly attend the seals, which are here opened every Thursday during the vacation, at which time the Chancellor answers petitions in public, and in that manner dispatches the ordinary motion business of the Court (a method introduced for the benefit of the secretary.) However, counsel are fee'd in all matters of consequence, by which means I have already heard most of their great men, who I can assure you, excepting one or two, would not appear so in England; but I will not as yet pretend to give the history of the profession in this kingdom, though I believe it may hereafter furnish matter for a very entertaining letter.

<sup>1</sup> If it be discovered that letters have been circulated soliciting briefs for a beginner on his first circuit, he is sentenced to silence during the whole of that circuit, without any evidence of *complicity*.

"The Chancellor omits no opportunity to apprise the people here of his friendship for me, and by his means I have received civilities from most of the persons of distinction in this city.

"The CASTLE is the St. James's of this place, where my Lord Carteret every morning plays the king and supports the character to admiration; and twice a week my Lady makes her appearance in the drawing-room, which for beauties (in proportion to their numbers) exceeds England. As to myself the Court here is more entertaining than that of England, as it is more agreeable to be one of the company than a spectator; my Lord and Lady having always done me the honor of talking with me in public.

"My present way of living is almost the reverse of what it was in England. I dress every day, visit ladies in a morning, receive compliments in form, and never stir without a chair; in short, I am frightened at my own appearance, and think I have more pretensions to the beau than man of business; but they comfort me and say 'it is the way of the place.' I have almost gone the round, and when that is over I will by degrees sink into my old way.

"The profuseness of the people in eating and drinking is most amazing, and may properly be called the *national vice*. It is no uncommon thing here for people, in a literal sense, to eat themselves out of house and home. Six dishes is the meanest table you sit down at, and entertainments have seldom less than fifteen. The wine is light and agreeable, but would not be esteemed in England; and if you go to the expense of the fullest wines you will save nothing by fetching them from this place.

"Dear sir, accept this as a first visit after long absence, where the conversation is perplexed by a variety of subjects; but I hope we shall often meet in this way, that our future familiar letters may sometimes deceive me and make me forget the distance by which I am separated from my friend.

"I am, dear sir, yours, &c.

"J. BOWES.<sup>1</sup>

"Pray inclose your letters to me under cover to the Chancellor."

In 1733, Mr. Bowes had become Solicitor General in Ireland, and he thus addresses his old friend:—

"24th September.

"I take it for granted there will be removes in the law in England before the next term, and it gives me great pleasure to hear from all hands that Mr. Ryder will be my elder brother."

This promotion having taken place, and Mr. Ryder having married on the strength of it, he received, somewhat tardily, the following congratulations from Mr. Bowes:—

"Dec. 21, 1733.

"Were you sensible of the fatigue I have undergone this session of

<sup>1</sup> This conclusion seems very cold; but at other times he says—

"Most affectionately yours,"

and

"Your most affectionate and faithful friend and servant."



parliament, you would readily excuse my neglect in not congratulating you sooner upon your marriage, promotion, and (what more affects me) the recovery of your health. Besides, I flatter myself you want not such proofs to convince you of my regard for your welfare and prosperity."

The next year Bowes wrote the following letter to Ryder, in reference to the custom which then prevailed of transmitting every Irish bill to London for the opinion of the English Attorney and Solicitor General before it was allowed to pass:<sup>1</sup>—

"April 30, 1734.

"Yesterday put an end to our tedious and troublesome session of parliament, in which I am sorry Mr. Attorney and you had so large a share. Perhaps experience may reconcile you to Sir Edward Northey's rule, who used to say he had no farther business with Irish bills but to take care of the King's prerogative and the interest of the mother country. I heartily rejoice to hear that you have got safe through the great fatigue of this winter, and hope by the time I can see London you will be so far at leisure as to admit of an hour's chat with an old friend."

Ryder had another professional friend, Mr. Wainwright, who was sent over to Ireland as a Puisne Judge, and from whom he received the following amusing account of Irish duels and of Irish juries:—

"Dublin, Aug. 3, 1733.

"Hitherto, Dublin has been, and in comparison of what it is now, like London in a long vacation compared with itself when the parliament is sitting. Now the ladies flock to town, and show that there are beauties in Ireland. The court here is very gay, and the Judges have as large a share of all public and private diversions as they please. These relish very well after a circuit of 500 miles in a very wild country where all the beautiful scenes of nature are accompanied with some horrors like the pictures of Salvator Rosa. [After describing a gigantic race of peasantry he had met with in Connaught, he proceeds:] These are a quiet civilized generation; but there is a strange alacrity to push among those who are just one degree removed from the common people. These gentlemen are much given to quarrel at assizes, and one part of our business is to bind them to their good behaviour. I think this noble science has left the capital, and is got now into the remote parts of the kingdom, where the fencing masters (who ought to be transported as vagabonds) teach schools. I tried, this summer, two of the scholars for as flagrant a duel as ever came before a court. If all the jury had been by when the challenge was carried, or at the place of battle (as many spectators were,) and saw each man kill his adversary, they would never have found them guilty of the murder. But I was surprised to find them persist in bringing in their verdict 'MANSLAUGHTER SE DEFENDENDO.' This they would do, that the prisoners might be free to fight again."

<sup>1</sup> Among the forms handed over to me when I was appointed Attorney General, was one to this effect:—"I hereby certify that I have perused this bill, passed by the two Houses of Parliament in Ireland, and am of opinion that it contains in it nothing repugnant to the law of England."

Four years having obscurely glided on, Ryder was promoted to be first law officer of the Crown, when Willis, the Attorney General, was made Chief Justice of the Common Pleas.

Mr. Attorney Ryder devoted all his energies to the duties of his office, which he performed most admirably. Although a quarter of a century in the House of Commons, he never mingled in debate except to explain some point of law. Ever faithful to the prime minister for the time being, he engaged in no political intrigues, and like the royal master whom he served, he "hated painters and poets," so that no attractive name is introduced in describing scenes in which he took a part. His energies were never called forth by any personal conflict, or any distinct [A. D. 1734.] complaint of his official conduct. Though the Jacobites grumbled a little, because he appeared so often against their leaders, they never attempted to charge him with the indecent bullying of former days, nor with straining the enactments of the law against them; so that his friends were not called upon to sound his praises. Hence the lasting light often struck out in the collision between the attack and defence of public men is here entirely wanting. Yet he was certainly a person of great importance in his own time; he never stirred out, even to pass between his house in Chancery Lane and his villa at Streatham, without a coach-and-six, and he was the admiration or envy of two generations of lawyers.

A few of his performances in parliament and at the bar are commemorated by cotemporary writers, and these it will be my duty shortly [A. D. 1737.] to notice.<sup>1</sup> Soon after he was made Attorney general he had to conduct through the House of Commons the Bill to punish the city of Edinburgh for the murder of Captain Porteus: and the following speech is reported or invented for him by Dr. Johnson:—

"Sir, the bill now before us I will venture to say is a bill that at this juncture must greatly contribute to the peace and tranquillity of this nation. The spirit of disaffection and riot seems to have gone abroad; and if a timely and effectual stop is not put to it by a vigorous interposition of the legislature, no gentleman can be bold enough to say where it may stop. In the chief city of one part of the United Kingdom it has already left too many proofs of its fatal tendency, and how soon it may communicate itself to the other I tremble to imagine. The Upper House, sir, has set us the example in what manner we ought to treat, and in what manner we ought to punish such unheard-of insolence and barbarity. I hope, sir, we never shall be upbraided with being cold in seconding their zeal; I hope, sir, that it never shall be laid to the charge of a British House of Commons that it has been remiss in resenting an insult upon all law and majesty, while British Peers have been forward in vindicating both. It is true that the charge against the provost and citizens of Edinburgh consists chiefly in their neglecting to prevent the tumult before it happened; in their neglecting to suppress it after it had happened; and in their neglecting to discover, apprehend, and secure

<sup>1</sup> He sat for Tiverton, and established an interest in this borough which gave his family the command of it till the passing of the Reform Bill in 1832.

those who were guilty of an audacious riot and of a cruel murder. But this charge which is the foundation of the bill is not to be considered as negligence only; for he who does not prevent a crime which he might and ought to have prevented, has always in law been looked upon as morally and legally guilty of that very crime. But it has been proved that the magistrates and citizens of Edinburgh might and ought to have prevented this insurrection, might and ought to have suppressed it, and might and ought to have discovered, apprehended, and secured the rioters and murderers. Therefore they are answerable for the crimes which have been committed; and the punishment to be inflicted upon them by this bill is mild and merciful."

Nevertheless, the resistance to it was so great, that all the stringent clauses which it contained were struck out, and it ended in imposing a fine for the benefit of Captain Porteus's widow, who had been promoted from presiding in his kitchen to preside at his table; "so that it merely converted a poor cook-maid into a rich lady."<sup>1</sup>

In a debate on the question whether the House of Commons should proceed in a summary manner to punish by its own authority the printer of a libel, or should direct him to be brought to trial before a jury, Mr. Attorney General Ryder said,— [A. D. 1740.]

"Sir, whence so much tenderness can arise for an offender of this kind I am at a loss to discover; nor am I able to discover any argument that can be produced for exempting from instant punishment the printer of a paper which has already been determined by a vote of this House to be a scandalous libel tending to promote sedition. It has, indeed, been agreed, that there are contained in the paper some true propositions, and some passages innocent, nay, rational and seasonable. But this, sir, is nothing more than to say, that the paper, flagitious as it is, might have been swelled to a greater degree of impudence and scurrility; that what is already too heinous to be borne, might by greater virulence become more enormous. If no wickedness, sir, is to be checked till it has attained the greatest height at which it can possibly arrive, our courts of criminal judicature may be shut up as useless; and if a few innocent paragraphs will palliate a libel, treason may be written and dispersed without danger or restraint; for what libel was ever so crowded with sedition, that a few periods might not have been selected which, upon this principle, might have secured it from censure? This paper was circulated among the representatives of the people as they entered this House, under the specious pretence of giving them useful information; but the danger of preventing intelligence from being offered to us does not alarm me with any apprehensions of disadvantage to the nation, for I have not so mean an opinion of the wisdom of this assembly as to suppose that it requires such aids from officious instructors, who ought, in my opinion, sir, rather to be taught by some parliamentary censure to know their own station, than to be encouraged to neglect their proper employments for the sake of directing their governors. When bills, sir, are depending by which either the interest of the nation or of particular

<sup>1</sup> 10 Parl. Hist. 274.



men may be thought to be endangered, it is, indeed, the incontestible right of every Briton to present his petition at the bar of this House, and to specify the reasons on which it is founded. This is a privilege of an inalienable kind, which is never to be denied or infringed; and this may always be supported without encouraging anonymous intelligence, or receiving such papers as the authors of them are afraid or ashamed to own, and which they, therefore, employ meaner hands to distribute."

The parties were summoned to the bar, and committed for a breach of privilege.<sup>1</sup>

A bill having been brought in "for the better manning of the Navy," [A. D. 1741.] which gave very objectionable powers to Justices of Peace to authorise the impressing of seamen by constables, it met with strong opposition; some members denying the right of impressment altogether, and proposing that bounties should be given to induce the voluntary enlistment of seamen in the navy:—

*Mr. Attorney General Ryder*: "Sir, the practice of impressing, which has been declaimed against with such vehement exaggerations, is not only founded on immemorial custom which makes it part of the common law, but is likewise established by our statutes. Why is it, therefore, to be considered illegal or unconstitutional? Upon an emergency, all must serve by land as well as by sea; and when the royal standard is erected in the field, all the King's subjects are bound to repair to it and to fight under it. This practice, which is as old as the constitution, may be revived at pleasure, and rests on the same foundation as the impressment of seamen. The safety of the state is the supreme law, which must be obeyed. As to the proposed bounties, they would be wholly ineffectual, impressment must still continue, the apparent hardships of the system would be aggravated, and you would have a much less powerful navy at a much greater cost to the state."

However, Sir Robert Walpole, seeing that the measure was so unpopular that it might precipitate his downfall, wisely abandoned it; and although a bill passed "for the better manning of the navy," all the obnoxious clauses were withdrawn from it.<sup>2</sup>

When Prince Charles Edward was about to engage in his chivalrous expedition, which for a time promised so favorably, and [A. D. 1744.] which terminated so disastrously, Mr. Attorney General Ryder introduced into the House of Commons the bill for suspending the *Habeas Corpus Act*. But we are only told that, "after enlarging on the present dangerous situation of affairs in this country, when not only a foreign invasion but domestic troubles were to be provided against, he said, that, fully convinced as he was of the importance of that invaluable law for the preservation of our liberties, he should as soon have cut off his right hand as stand up to make that motion, if he were not fully persuaded that it was absolutely necessary to secure all the invaluable blessings which we enjoyed."<sup>3</sup>

His greatest effort seems to have been his defence of Lord Hardwicke's

<sup>1</sup> 11 Parl Hist. 887.

<sup>2</sup> 12 Ib. 26-143.

<sup>3</sup> 13 Ib. 671.



bill attainting the sons of the pretender should they land in Great Britain or Ireland; making it high treason to correspond with them, and postponing till their death the mitigation of the English law of treason introduced at the Union for doing away with corruption of blood in all cases of high treason. Not only Jacobites, who looked eagerly for a restoration of the true line, but Whigs, who had assisted in effecting the Revolution and sincerely supported the new dynasty as necessary to constitutional government, were shocked by the proposed enactment that the young Princes, the undoubted heirs of Cerdic the Saxon, of William the Conqueror, of the Plantagenets, whether wearing the white rose or the red, of the Tudors, of the Bruces, and of the Stuarts,—although, personally, they had committed no offence against the British nation, and although they must have considered that they were engaged in a holy enterprise when they were trying, with the assistance of faithful adherents, to recover the crown for their exiled father,—if taken prisoners in the country which their ancestors had ruled for fifteen hundred years, should, without any form of trial, be hanged like dogs on the bough of the next convenient tree. The new treason of simply corresponding with them while they remained in distant lands was startling, as the interchanged letters might amount to mere courtesy, or might touch some point of philosophy or the arts. But the indefinite prolongation of forfeiture of all property and all honors, on a conviction for high treason, was that which caused the greatest alarm. The union with Scotland never could have been accomplished except upon the solemn promise that, if the English law of treason was introduced into that country, “corruption of blood,” its most cruel incident, should entirely cease at the death of the son of James II. The new measure was denounced as not only unjust and inhuman in itself, but as the breach of a national compact, and of the condition on which the Hanoverian family had been invited to the throne.

*Mr. Attorney General Ryder:* “Sir, the clause for attainting the two sons of the Pretender, in case they should land or attempt to land in Great Britain or any of the dominions thereunto belonging, can stand in no need of any longer explanation, or of many arguments for securing to it your approbation. It is vain, sir, to talk or to think of hereditary right to the crown beyond what we find in the Act of Settlement. Our only legitimate sovereign is his Majesty King George II., to whom we have all sworn allegiance, and whom God long preserve! All who contest the right to the crown of him and his heirs, must be treated as traitors. We cannot look to the pedigree of those who compass the death of our lord the King or levy war against him in his realm. The stability of government is essential to the good of the people, and this can only be secured by speedily disposing of those who claim the crown and try to get possession of it by force of arms. On this principle the Duke of Monmouth was attainted by parliament, and executed without any form of trial; and on the same principle the present Pretender, calling himself James III. and James VIII. of Scotland, was himself attainted by act of parliament in the year 1715. Notwithstanding the attainder, no one

would be justified in putting the law in force without a warrant from the Government, and there would always be room for a display of royal clemency. With respect to the prohibition of corresponding with the sons of the Pretender, I am not much surprised that there should be some uneasiness, considering how many (wishing to have two strings to their bow) ever since the flight of James II., while they professed a devoted adherence to the new order of things, have wished to keep up a good understanding with the exiled family, contemplating the possibility of a new Restoration. Ought this double-dealing to be encouraged? The courtesy to be found in such letters is the offer of a hospitable welcome in Lochaber, the philosophy discussed is the divine right of kings, and the art to be illustrated is the art of rebellion. For the good of hot-headed Jacobites and Janus-faced politicians themselves, such correspondence should be interdicted, that they may be saved from temptation and delivered from evil. The clause continuing the existing law of forfeiture for treason till the death of the sons of the Pretender will require some more observation, for it has been represented as inconsistent with religion, inconsistent with natural justice, inconsistent with national good faith, and inconsistent with the freedom of our constitution. All that can be said against forfeiture for treason must proceed from mistaking or misrepresenting the nature of punishment, and the end for which it has been introduced into human societies. It is said that punishment is '*malum passionis, quod infligitur ob malum actionis*,' and therefore in its own nature it must be confined to the person of the criminal; for whoever intends to inflict a punishment upon an innocent person, cannot properly be said to punish: on the contrary, he deserves to be punished, because, in so doing, he commits a crime, or a '*malum actionis*,' and for that reason ought to suffer a "*malum passionis*.' However, there are many misfortunes, inconveniences, and losses which innocent men are subjected to by the nature of things, and may be exposed to by the laws for the preservation or welfare of society. It is a misfortune for children to be born of parents afflicted with hereditary diseases; it is a misfortune for children to be reared by parents who are poor or profligate: but these misfortunes are not to be called punishments. In countries where slavery is permitted, children born of slaves are the property of the masters of their parents. In the ancient Roman commonwealth, the children of plebeians could not marry into a patrician family, nor be advanced to any of the chief posts of the government. In a similar category are children, by our law, born of parents convicted of treason. If the good of society requires the property of the parent to be forfeited for his crimes, his children suffer a misfortune, but are not subjected to punishment."

He then proceeds at enormous length, but with very considerable ability, [A. D. 1774.] to quote the opinions on this subject of Grotius, of Puffendorf, and of Cicero; and to examine the treason laws of the Jews, of the Athenians, of the Romans, of the Saxons, of the Normans, and of the English from the reign of Edward III. downwards; showing that, by the most enlightened statesmen and the wisest nations, forfeiture of property had, for the peace of society, been inflicted as a punishment

on those who had attempted to overturn the existing government, whether monarchical, aristocratical, or mixed; and the love of parents to children had been taken advantage of to deter men from crimes which are subversive of social order, and to which there is often a strong inducement from ambition, cupidity, and love of change. He thus concluded:

“The execution of a traitor is a fleeting example; but the poverty of his posterity is a permanent lesson of obedience to the laws, whereby rebellion and civil war are prevented, and liberty is allowed to flourish. The reason which induced Parliament to continue forfeiture for treason in this country, at all events till the death of the old Pretender, now applies with equal strength to continue it till the death of his sons. The infatuated attachment to the family which systematically attacked, and which if recalled would soon effectively destroy, both our religion and our liberties, still continues; and wicked men, under pretence of it, seek to prosecute their own schemes of lawless aggrandizement. Whether we shall ever abolish a punishment so salutary and necessary, there is no occasion now to determine; but, at all events, while the Pretender’s sons survive, there will always be too many amongst us affected by an itch of rebellion; and all lawyers and politicians agree, that severity of punishment should be in proportion to the evils arising from the offence, and the probability of its being repeated.”<sup>1</sup>

The bill passed; but it had no effect in deterring Charles Edward from his purpose, or in cooling the ardor of his followers; and as wise men preferred the existing system of government, from the superior advantages enjoyed under it, I suspect that the more prudent course would have been, by amending our laws, to have removed the unpopularity from the Government,—which was then so great that the mass of the nation looked with indifference to the result of the contest.

The next speech of Mr. Attorney General Ryder transmitted to us is an extremely elaborate one, which he delivered against a bill introduced to prohibit insurances on French ships during the war. Carrying the principles of free trade to an extreme which startles us even in the present age, he contended that we should be gainers by indemnifying French merchants against English capture; and this proposition he enforced and illustrated by an immense body of statistics and calculations, which would now be uninteresting. Having shown the large profit made by insuring enemies’ property, he pointed out the imprudence of sacrificing this in the vain hope of destroying their commerce:—

“Like the dog in the fable,” said he, “by snatching at the bone we fancy we see in the water, we shall lose that which we now hold in our mouth. The trade of insuring we possess without a rival; but it will soon be established in other countries, and our own merchants may deal with foreign insurance-companies. Let the King of France but talk of insurances in his drawing-room; let him but say it is a business no way inconsistent with noblesse; let him but insinuate that he will show favor

<sup>1</sup> 13 Parl. Hist. 889.



to those who engage in it, and the whole French nation will become insurers."

However, although he was ably supported by Murray the Solicitor General, the bill passed; and, indeed, our courts would now consider such insurances void at common law, as contracts with alien enemies, and contrary to public policy.<sup>1</sup>

On the death of Frederick Prince of Wales, Mr. Attorney Ryder had [A. D. 1751.] to carry through the House of Commons the bill for appointing the Princess of Wales Regent, with a Council to control her, at the head of which was the Duke of Cumberland. This last part of the arrangement was very unpopular, and he had great difficulty in defending it. Having observed that the precedent now established would settle the practice of the constitution for the future, he thus proceeded:—

"I shall freely grant, sir, that a sole regent, with sovereign power, is more consonant to our constitution, and less exposed to faction, than a regent limited and restrained to act in all matters of great importance by the advice of a council of regency; but will any gentleman say that the appointing of a sole regent with sovereign power ought to be laid down as a general rule to be observed in every case of a minority? If we appoint a regent with a council of regency, we are exposed to the danger of faction; if we appoint a sole regent with absolute power, we are exposed to the danger of an usurpation. But as usurpation is a danger much more terrible than faction, the safer general rule is, that a council of regency ought to be established, and that the regent be confined to act by their advice." He then went over the various minorities which had occurred in English history since the accession of Henry III., illustrating his proposition by the manner in which a limited and unlimited regency had worked; and thus concluded:—"If a sole regent with sovereign power should now be appointed, I am persuaded the same course will ever after be insisted upon, till some regent, like Richard III., has convinced us when it is too late of the danger we incur. If I were to look no farther than the excellent Princess named by this bill, I would cheerfully intrust her with absolute sway; but I am sure she has too much wisdom not to excuse our refusing to pay her a compliment at the apparent risk of one of her posterity."

The bill passed as introduced, but never came into operation, as George II. survived till his grandson was of age.<sup>2</sup>

The last time that Sir Dudley Ryder ever spoke in parliament was in [A. D. 1753.] supporting Lord Hardwicke's celebrated bill "to prevent clandestine marriages." He showed at great length, and with much ability, the evils produced by the existing system of giving validity to every marriage celebrated by a priest in orders, in any place, at any hour, without license or proclamation of banns, and without the consent of parents or guardians; he proved that it was within the just power of the legislature to regulate the manner in which this, the most important of all contracts, shall be entered into; and he defended the

<sup>1</sup> 14 Parl. Hist. 128.

<sup>2</sup> Ibid. 1023.



several provisions of the bill which were to guard alike against the passions both of the young and the old :—

“ We often find,” said he “ the passion called *love* triumphing over the duty of children to their parents ; and, on the other hand, we sometimes find the passions of *pride* and *avarice* triumphing over the duty of parents to their children. I am persuaded that our ancestors would long ago have applied a similar remedy, but for the superstitious opinion that when a marriage between two persons come to the age of consent, though minors, is once solemnised by a priest in orders, it is so firmly established by the Divine Law, that it cannot be declared null by any human tribunal. Thank God ! we have, in this age, got over such dogmas ; and the Right Reverend Bench in the other House deserve well of their country for consenting to render Christianity consistent with common sense.”

After a furious opposition the bill was carried ; but Mr. Attorney ought to have seen a gross defect in it, which we have lately cured,—that it allowed the validity of marriages to be questioned at any distance of time upon an alleged non-compliance with its provisions, although the parties might have lived many years together as man and wife after they had come of age.<sup>1</sup>

It must be acknowledged that Ryder’s parliamentary career was not brilliant, but he deserves the praise of never having affected what he could not accomplish, and of having, without envy or jealousy, confined himself to professional subjects, while Murray, his inferior officer, was the ministerial leader in the House of Commons, and was contesting the palm of eloquence with the elder Pitt.

In the courts of justice, Sir Dudley Ryder, as Solicitor and Attorney, did the business of the Crown very efficiently ; but, with the exception of the trials which arose out of the Rebellion of 1745, he was not engaged in any permanent interest. In addressing the jury he studied brevity to a degree which astonishes us, accustomed to the long-winded orations of modern times. The following is the whole of his speech (as taken by a short-hand writer) in opening the important prosecution for high treason against Colonel Townley, who had proclaimed the Pretender in Lancashire, and had commanded a regiment of horse in [A. D. 1746.] his service :—

“ My Lords, and you, Gentlemen of the Jury : The prisoner at the bar, having been deeply engaged in the late unnatural and wicked rebellion, begun in Scotland, and carried into the heart of this kingdom, in order to upset our present happy constitution in church and state, hath rendered necessary this prosecution against him. I do not doubt but that, in the course of our evidence, we shall make it appear to your satisfaction that the prisoner, with others his confederates, did assemble in a warlike manner, and procured arms, ammunition, and other instruments of war, and composed a regiment for the service of the Pretender to these realms, to wage war against his present most sacred majesty, and did march through and invade several parts of this kingdom, and unlaw-

<sup>1</sup> 15 Parl. Hist. 1.

fully did seize his Majesty's treasure in many places, for the service of their villainous cause, and took away the horses, and other goods, merchandise, and chattels of many of his Majesty's peaceable subjects; and that, during the said march, the prisoner, with other rebels, in open defiance of his Majesty's undoubted right and title to the crown of these realms, frequently caused the Pretender's son to be proclaimed in a public and solemn manner as regent of these realms, and himself marched at the head of a pretended regiment, which they called 'the Manchester regiment.' My Lords, I shall not take up the time of the Court in saying a great deal, for all that the prisoner is charged with will appear so full and plain, from the evidence we shall produce for the King, that there will not be the least doubt with the jury to find him guilty."

The prisoner's counsel, in stating the defence, that he had acted under a commission from the King of France, "acknowledged that the Attorney General had opened the case with all the candor that could be expected, and had not exaggerated the charge beyond the bounds of humanity and good nature." The trial, which now-a-days would last a week at least, was all over in a few hours.<sup>1</sup>

On the impeachment of Lord Lovat, the conduct of the prosecution before the House of Lords chiefly fell on Sir Dudley Ryder, as one of the managers for the Commons. In opening the case he distributed the facts under three heads: "1. Those which happened precedent to the Pretender's sons landing: 2. What happened after that time, and before the battle of Culloden: 3. What arose since that happy event:"—

"The first," said he, "Will disclose to your Lordships a wicked and traitorous scheme, begun and carried on for many years, for bringing over the Pretender by the assistance of a foreign force, in which his Lordship will appear to have had a principal hand. The second will include the more immediate scene of action in the late wicked rebellion, and the particular parts which the prisoner took in it. The third will show him in the circumstances of a defeat; and, in every part of this whole scene, he will appear plotting, associating, and supporting all the steps that were taken for subverting this happy establishment, dethroning his Majesty, and substituting a Popish Pretender in his room."

He then traced the secret machinations of the Highland chiefs, guided by Lord Lovat, to restore the exiled royal family; and he gave a lively sketch of the well-known military operations, from the landing of the Pretender, till the final overthrow of his cause, showing how the prisoner, while pretending to stand by King George, had sent his clan to fight on the other side under his son, the master of Lovat. Thus he proceeded:—

"I am now come, my Lords to that last period of time—from the battle of Culloden. The prisoner was waiting, not very far off, the event of that important day. The night after, the Pretender's son came to Gortuleg, where the prisoner was, and had an interview with him.—The noble Lord did not even then disavow his cause, but received him as his prince; excused his not joining him in person; and, after the

tenderest embraces, parted from him as a faithful subject to a royal master. The prisoner, as well as those who had been in open arms, was obliged to fly. He knew his guilt was the same as theirs, and that he deserved the same treatment. The rebel army, and the chiefs who escaped from the battle, were now dispersed; but, on the 15th of May, a meeting was held at Mortleg, to consider what was proper to be done for their common safety. The noble prisoner at the bar met them—not as an innocent person, to advise them to lay down their arms and beg for mercy; not as a neutral person, if neutrality in the cause of our King, religion, and liberty can be attended with a less degree of guilt; but as one involved in the same common crime and calamity,—as a chief whose age and experience entitled him to the lead; and he took it. He advised them to raise a sufficient number of men to defend themselves against the King's troops till they could make terms for themselves; he proposed that his son should muster 400 Frasers; and, there being 35,000 louis d'or remaining of the subsidy lately received from France, a sum equal to twenty days' pay for this band was paid to his servant. When the master of Lovat, at a subsequent meeting, proposed to surrender to his Majesty, the prisoner dissuaded him from it, and reflected upon him as a person of mean spirit to think of so dishonorable an action. He himself made off, with a guard of twenty soldiers, whom he took into pay for his defence. However, he was pursued and taken by a party sent after him by the Duke of Cumberland. Being asked how he could act as he had done after all the favors he had received from the Government, he answered 'It was not against the King I acted, but the Ministry, who took away the independent company I had been trusted with. Who would have thought but that the Highland men would have carried all before them? If the young Pretender would have taken my advice, he might have laughed at the King's forces: none but a madman would have fought that day. Besides, we were in daily expectation of farther assistance from France.' When brought before Sir Edward Faulkener he did not think of denying his treason, but made the same open avowal of his motive, adding, 'I resented the loss of my independent company so much that, if Kouli Khan had come, I should have been for him.—Your King is merciful, and will remember the services I have formerly done to his family. I can still do greater than twenty such old heads as mine are worth. However, I am ready for any part which he may assign to me,

. . . "In utrumque paratus,  
Seu versare dolos, seu certæ occumbere morti."

The Commons have thought this a matter worthy their interposition, and therefore have taken it into their own hands, because the prisoner has been the contriver, the promoter, and the conductor of the rebellion, so far as Providence suffered it to go. I have entered into the case so fully, that your Lordships may have the greatest of all satisfactions which judges can desire, the certainty of pronouncing a right judgment; and as to the people in general, it is of no small moment that they should

be enabled to behold in one man the pernicious schemes which, for many years, have been concerting between Rome, France, and unnatural traitors at home,—that they may see the rebellion, from which they have lately so severely felt, clearly traced to its source, and be fully convinced that whilst they are themselves enjoying at their ease, and too often asleep, their religion, their liberties, and their properties, under the protection of the best of princes, and the influence of the wisest constitution ever framed, they have enemies both abroad and within their own native country who are constantly awake for the destruction of all they hold dear,—and learn this certain truth, which should be imprinted in everlasting characters on the mind of every Briton, that there is no effectual security against the determined and persevering conspiracies of those who condemn both divine and human laws but a firm and vigilant union of honest men. Any attempt to prevent, dissolve, or weaken such a union is little less than treason in its beginning, and, if not speedily crushed, it must lead to the worst that can happen to this land of liberty, the total destruction of the royal family and of the happiness we now enjoy under their benign sway.”<sup>1</sup>

In the last recorded case in which Sir Dudley Ryder appeared as an [A. D. 1753.] advocate, he met with a very flagrant mortification. This was the prosecution of William Owen for a libel, which the Attorney General was ordered to institute by a vote of the House of Commons, the party supposed to be libelled, in consequence of their foolish commitment of the Honorable Alexander Murray. In his opening address to the jury, he was by no means abstemious in praising his clients or in abusing their detractor:—

“The libel,” said he, “contains charges of partiality, injustice, barbarity, and corruption against the House of Commons, that House which is the guardian of our liberties and the protector of all we hold dear. Every one must be shocked who reads this wicked—diabolically wicked pamphlet. The Parliament has justly voted it ‘a false, malicious, infamous, scandalous, and seditious libel, tending to create confusion and rebellion.’ To me it is astonishing how it could enter into the mind or heart of man to write such a libel. What! shall a person appeal from the judgment of that court who are the only judges of things pertaining to themselves—I mean the House of Commons? An appeal! To whom? To a mob! Must justice be appealed from? To whom? To injustice! The writer says ‘he appeals to the good people of England, particularly the inhabitants of Westminster.’ The House of Commons are the good people of England, being the representatives of the people. The rest are—what? Nothing, unless it be a mob. And what can be in a mob but confusion? But the clear meaning of this libel was an appeal to violence. Gentlemen, whosoever reads this libel will find it the most pungent invective that the skill of man could invent. I will not say the skill, but the wit, art, and wicked contrivance of man, instigated by Satan. To say that this is not a libel, is to say that there is no justice, equity, or right in the world. If the House of Commons is not to be



defended, and to have protection and relief in a court of law, yourselves, your homes, and your children will be without protection or relief. You will see, gentlemen, whether the evidence does not satisfy you that the libellous pamphlet was sold in the shop of the defendant; and, in that case, it will be your duty to find him guilty."

An Attorney General who should now make such a speech—denouncing the whole constituent body, or the people of England, as a mob, without any touch of reason or sense of justice—would be impeached, unless he were shut up in a madhouse. Even a century ago it seems to have given mortal offence to those to whom it was addressed. The jury by an artful dodge, might have been wheedled out of their rights,—but they would not have been Englishmen if they had suffered themselves to be thus bullied. The sale of the pamphlet in the defendant's shop by his authority was incontrovertibly proved; yet, although the Chief Justice fully adopted the doctrine that the jury could not look beyond this fact, they took the question of *libel or no libel* into their own hands, and to the unspeakable delight of the public,—without condescending to answer whether they considered the evidence of *publication* sufficient,—insisted on finding a general verdict of NOT GUILTY.<sup>1</sup>

Mr. Attorney was afraid to face the mob assembled round Guildhall, and concealed himself in the Lord Mayor's closet. After a few hours he ventured to return to his house in Chancery Lane; but he found a great bonfire blazing in Fleet Street, and, before his hackney coach was allowed to pass, he was obliged to give something to drink to the health of the jury;—in return for which, without knowing their benefactor, they threw to him a copy of the following song, supposed to be sung by the foreman and a chorus of jurymen, but actually composed by an Irish porter.<sup>2</sup>

"Sir Doodley, Sir Doodley, do not use you so rudely;  
You look pale as if we had *kilt* ye:  
Sir Doodley, Sir Doodley, we shamefully should lye,  
Were we to say the defendant is GUILTY.

"A fig for the Commons! Who now cares for their summons?  
Or their votes on the press to make war?  
Murray made them look glum ones by calling them '*rum 'uns*,'  
And refusing to kneel at their bar.

"Mr. Attorney's grim wig, though awfully big,  
No more shall frighten the nation;  
We'll write what we think and to LIBERTY drink,  
And defy his *eggs-off*. INFORMATION."<sup>3</sup>

Sir Dudley Ryder had been for some years impatient for the tranquillity and security of the bench, and he was soon after thrown into a deep consternation by the death of Mr. [MARCH, 1754.]

<sup>1</sup> 18 St. Tr. 1203-1230; ante, p. 227.

<sup>2</sup> Lond. Mag. 1753. Lord Mahon's History, iv. 27. Kneeling at the bar of the House of Commons never was heard of more.

<sup>3</sup> I presume *ex-officio Information*.

Pelham, the Prime Minister, which threatened a complete dissolution of the Cabinet. After such a long and prosperous voyage, when within sight of port he suddenly found himself among breakers, and he was afraid of being cast away on the dreary shore of opposition. The vessel righted, but he had little confidence in the new pilot, and he dreaded some fresh disaster.

Not inopportunately for the Attorney General came the apoplexy of the Chief Justice. There was no hesitation as to the manner in [APRIL 8.] which the vacancy was to be filled up; and, as soon as the necessary forms could be complied with, Sir Dudley Ryder took his seat in the Court of King's Bench, as the successor of Sir William [MAY 2] Lee, and was made a Privy Councillor. He was sworn in privately at the house of the Lord Chancellor, the parade of installation speeches having become obsolete. It was expected that he would be immediately raised to the peerage; but Lord Hardwicke's reluctance to have any law lord in the House of Peers, besides himself, still prevailed.

Lord Chief Justice Ryder's judicial career was extremely brief, being [A. D. 1745.] only a few days more than two years. During this period he reputably performed the duties of his office; but those who expected that he was to introduce reforms and improvements into the administration of the Common Law were disappointed, for he listlessly allowed all things to go on as he found them. He had no ambition to raise his fame above that of his immediate predecessors, and he satisfied his conscience by deciding to the best of his ability the cases which came before him, according to the antiquated routine which had long been condemned. His decisions are to be found in the Reports of Sayer and Lord Kenyon; but, in looking through them, I can find none which, from the importance of the point adjudged or the mode of reasoning adopted, would now be interesting. He had not to preside at any trial for treason or libel; and he came in for no share of the popularity soon afterwards enjoyed by Camden, or of the obloquy cast upon Mansfield.

Resentment was excited in his mind by the consideration that the rank was withheld from him which had been conferred on his predecessors, Jeffreys, Parker, and Raymond, and which his ample fortune would have so well enabled him to support. The profession took part with him; and, feeling that their consequence was impaired by the rule laid down that the Chancellor was the only lawyer who could hope to be ennobled, loudly asserted that the public suffered from their being no Common Law Judge permitted to sit in either Chamber of Parliament. All these complaints would have been vain if the Duke of Newcastle, now tottering to his fall, had not wished to strengthen himself by making new peers. He had been out-voted in the House of Commons on Pitt's Militia Bill, and his noble whipper-in gave him notice that neither the list of ministerialists in town nor the proxy-book was quite satisfactory. He immediately suggested the Chief Justice of the King's Bench as one new peer; and, seeing that from the moderate abilities and unambitious disposition of this individual he never could be a candidate for the chancellorship, or formidable from obtaining influence in a deliberative as-

sembly, Lord Hardwicke did not resist the proposal. Sir Dudley, pleased that his wife was to be a BARONESS, that his children were to be *Honorable*, and that the prophecy of his grandfather was about [A. D. 1756.] to be fulfilled, joyfully accepted the offer, and fixed upon the title of "Lord Ryder, Baron Ryder, of Harrowby in the county of Lincoln." Accordingly, on the 24th day of May, 1756, the King signed a warrant addressed to the Attorney General, commanding him to make out a patent of peerage by this name, style, and title; and it was agreed that the following day the new peer should go to St. James's, to kiss hands on his elevation, when the dignity would have been considered as virtually conferred, although some days more were required for the patent to pass the great seal. Alas! amidst the felicitations of his family and his friends, he was struck that very evening with a mortal malady, and in twelve hours they were weeping over his corpse. He had reached his sixty-sixth year, but, from a good constitution and temperance, he seemed to be only entering into green old age, and a considerable period of enjoyment and of usefulness was still supposed to be before him.

We may judge of the sensation produced by this calamity from a letter of Archbishop Ryder to the widow of the Chief Justice, in which he says,—

"A greater loss could not be to his family or his friends: few were ever so great a blessing to all that had the honor to be related to him. His kindness to me and to my nephews [JUNE 4.] has been boundless: what his Majesty and the public have lost by his death will be testified by the universal lamentation of it. Whatever may be the sorrow of those who are immediately affected by it, their duty is to endeavor to overcome it: the living require this of us; and the dead, if they knew it, would grieve at our grieving for them."

A few days after, his Grace thus addressed the son of the Chief Justice:—

"It is my duty to write to you, though I gave my lady your mother the trouble of a letter by the last post, and can now do little more than mingle my tears with the flood of sorrow which overwhelms you on account of the loss of your invaluable [JUNE 7.] father. He was ever a father to me and mine in the most signal acts of affection and kindness. That he is snatched away thus so suddenly, and at so critical a juncture, has the appearance of the hand of God in a very extraordinary manner, and yet the ways of God with man are unsearchable. Possibly he may have been taken from us at the time he was the ripest for the honor with which posterity will have him in remembrance. I would hope too that the honor intended his Lordship by his Majesty will be redoubled to him by its being renewed to you as a testimony of your father's uncommon merit, and of his long and faithful services to the Crown. However this may be, and however we may be grieved for the loss of him, we have the comfort to hope and to believe that his lot in the other world is with the children of God, and that he is numbered with the saints."

It was generally expected that the son's name would be inserted in the patent instead of the father's, and that he would forthwith be declared Lord Ryder of Harrowby; but, as he was not yet of age, he could not have voted in the critical division which was expected, and poor old Sir Dudley's "long and faithful services to the Crown" were already forgotten. Lord Hardwicke no longer felt any jealousy upon the subject, but he treated it with the coldest indifference. By the advice of some friends of the family, a memorial to the King, stating the facts of the case, was prepared; and they proposed that the young gentleman himself should be presented to his Majesty, in the hopes that on this occasion there might be a favorable announcement of the royal will. The Honorable Charles Yorke, then Solicitor General, being applied to that he might use his good offices with his father, wrote the following frigid reply:—

"Dear Sir,—I have just seen Lord Chancellor, who is clearly of  
[JUNE 20.] opinion that you had better defer being presented to the King till after his Majesty shall have given an answer to the memorial, and till after your coming of age, which I acquainted him will be in the beginning of next month. He thinks the memorial very properly drawn, and will present it some day next week. He is certainly your friend in it, and I wish you all possible success. If I can be of the least service to Lady Ryder or yourself, you may always command me. Nothing can exceed the respect and love which I bore your father, and the obligations which I owe to his kind friendship are such as entitle you to every return in my power.

"I am, dear Sir, with the greatest regard and esteem,

"Your affectionate and faithful servant,

"C. YORKE."

In the political crisis which arose from Murray's determination to succeed Sir Dudley Ryder, and which terminated in the resignation of  
[A. D. 1756.] the Duke of Newcastle and Lord Hardwicke, the Ryder memorial was forgotten, and for years to come the Ryder peerage was not thought of except among the members of the family. [Nov. 8.] The good Archbishop, to be sure, wrote, "Possibly the change of ministry, if what is said of it be true, may have placed those at the helm who will be more desirous of serving you. The Duke of Devonshire, I am well assured, was a fast friend to the late Chief Justice, your father; I have the honor to be known to him, and if any solicitation of mine could be of the least service, I would go over to try what might be done in it."

But it was not till twenty years after, when Mr. Ryder had served in the House of Commons during several parliaments for the borough of Tiverton, and had zealously supported the administration of Lord North, that he was at last raised to the peerage by the title of Lord Harrowby.<sup>1</sup>

<sup>1</sup> Unfortunately the Ryder family had a quarrel with Lord Mansfield about the state coach, which was to be transferred to the new functionary at a valuation, as the Lord Chancellor's coach is still transferred. A testy note dated Nov. 29, 1756, says—"Lord Mansfield is only solicitous that Mr. Ryder may do what is



We must now go back to take a parting glance at the old Chief Justice himself, who, if he retained any of his human feelings after shuffling off this mortal coil, must have been rather indignant when observing the neglect with which his heir had long to struggle, although he might not care much about his own dwindling reputation.

I have nothing more to say in his praise as a public man, but it should be known that in private life he displayed the most amiable qualities, and that no fault could be imputed to him, except, perhaps, that he was rather too uxorious. In his thirty-third year he married a charming woman, to whom he was tenderly attached—Anne, daughter of Nathaniel Newnham, Esq., of Streatham, in the county of Surrey, and he lived with her in uninterrupted harmony and happiness. While she possessed a cultivated mind and elegant accomplishments, she managed not only all his household affairs, but all his pecuniary transactions, so as to leave him entirely free for his professional and official pursuits. They never were separated for more than a day except once. In the summer of the year 1742 she fell into ill health, and she was ordered by her physicians to Bath. He accompanied her, and nursed her till the approach of Michaelmas Term indispensably required his presence in London, while she remained for some weeks behind to complete her cure. During this interval he wrote her a letter daily, however busy he might be,—sometimes doing so while a trial in which he was counsel was proceeding. These effusions are preserved, and I introduce a few of them for the gratification of the reader who is pleased with genuine touches of sentiment and photographic sketches of domestic scenery.

Having been employed by Henry Fielding to move for an injunction to restrain a bookseller from publishing a pirated edition of JOSEPH ANDREWS, and having been defeated by reason of an error in the jurat of the affidavits,—before being called upon to speak in another cause, he thus addressed Lady Ryder :—

“Westminster Hall, Saturday.<sup>1</sup>

“My dearest Girl,—I can’t help thinking of you in the midst of the noise of Westminster Hall. I have this moment sat down after endeavoring to rescue Jos. Andrews and Parson Adams out of the hands of pirates, but in vain; for this time we are foiled by a mistake in the attack. However, another broadside next week will do the business.

“I find this place just in the same situation I left it in,—filled with the same reverend and learned judges and counsel, and attended with pretty much the same clients.

“The Chief Baron’s cushion is still empty, and I don’t find at all how it is to be filled.

most agreeable to himself, and as to the rest is extremely indifferent. But he would not, for much more than the value of the coach, have more than one word about such a transaction with Mr. Ryder, for whom he has the greatest regard, and to whom, upon his father’s account, he would be ready to show upon all occasions every act of civility and friendship.” I do not know whether the collar of S. S. passed with the coach. This gold decoration is the personal property of the Chief Justice; and his family sometimes retain it as a memorial of their founder, and sometimes hand it over to his successor.

<sup>1</sup> Indorsed “Oct. 23, 1742.”

"I am going from hence to Tooting,<sup>1</sup> and expect Molly and Dudley<sup>2</sup> to call me in case I can't get away time enough to return to Chancery Lane by three.

"Adieu, my Best Beloved,  
 "And Dearest Friend,  
 "D. R."

Three days after, he gives her an account of the extraordinary rage for theatricals then stirred up by Garrick :—

"26th October, 1744.

"Last Saturday the Chancellor was seen at Drury Lane play-house. The extraordinary character of Garrick in *Lear* would justify the presence of a bishop, especially to my Lord of Killaloo, who has heard that in Ireland the Chancellor and the Judges open the term with a play, at which, I presume, the Bishops assist."

The following was written by him on a most auspicious anniversary—which luckily fell that year on a Sunday, when he was left entirely free from the distractions of business :—

"Streatham, 1st Nov. 1742.

"My Dear,—I am now here to celebrate your wedding-day. Let me congratulate myself and you on the happiest circumstance of my life. How many joyful hours had I lost if my good fortune had not thrown me in your way! I should not, indeed, have known my loss, but I might now have been lamenting another wedding, or sinking under the weight of solitude and indolence, without any end to pursue by all my labors, or satisfaction in my acquisitions. Accept, my dear, the warmest acknowledgments of a grateful heart for the many blessings you bestow upon me; and, above all, for my dearest boy, whose mind daily opens and discovers a fund of goodness and understanding that charm me. I am just come from teaching him the New Testament in Latin. He makes his comments so naturally on every verse, that I am better pleased with the knowledge he treasures up than the Latin he acquires by it. He has found out a method of discovering the end of the world which neither Whiston nor any other of our commentators on the Revelation have hit upon. 'Papa,' says he, 'the Bible says the end of the world will not come till the gospel is preached to all nations: now the Blacks and the Turks have neither of them had it; so we may be sure the world is not yet near its end.'

"I am, my dearest,  
 "Yours for ever,  
 "D. R."

The next letter, remarkable for its lively gossip, was written in an evening sitting of the Court of Chancery, during the hearing of a cause, after Sir Dudley had dined with the Chancellor of the Exchequer, and had (I suspect) partaken very copiously of his claret. These evening sittings were continued till the beginning of the reign of George III., when they were abolished with the consent of that sovereign, on the

<sup>1</sup> Where he had a villa.

<sup>2</sup> His children.

avowed reason that the Chancellor himself was apt to appear at them not "as sober as a judge" ought to be.<sup>1</sup>

"Lincoln's Inn Hall, Nov. 3, 1742.

"My Dear,—I have received your letter, and must answer it now or not at all to-night. I have been to pay my compliments at the Prince's court. Miss Fazackerly appeared there for the first time, and kissed hands. Mrs. Campbell inquired there after your health. She looks like a ghost,—not at all improved by Tonbridge. I to-day dined, by invitation, at the Chancellor of the Exchequer's. It was in the same house where I used to see Lord Orford. How different now from what it was!—not more in the nakedness of the walls than the abilities and disposition of its owner. The Earl of Bath has just had a great wind-fall by the death of one Mrs. Smith. She was mistress to the late Earl of Bradford, who had settled upon her and her son an estate of about 8000*l.* a year, and in case of the son's death without issue the disposition of it was given to her. The son became a lunatic, and is now under the care of the Court of Chancery without any probability of recovery. The Earl of Bath had assisted the mother as a friend to the Earl of Bradford. She in recompense has given him, in case of her son's death, the bulk of the estate. She has a husband, who had so nice a sense of honor, that he would not only have nothing to do with her while she was in that criminal correspondence, but since would not meddle with the wages of iniquity, and so left her and every thing to her own conduct.

"I would have you make haste to town and keep me out of bad hands, for I am in great danger of growing a rake whilst left to myself, for I have been no less than twice at the play in a week's time. It's true the immediate temptation was to see Garrick, but how soon I may recover my youthful taste for *diversion* I can't say. I'm glad the Bishop is coming to town.

"Adieu, my dearest,  
"D. R."

The following letter, written next day, ingeniously assigns a very innocent origin to a headache with which Sir Dudley was then afflicted. But we cannot place exactly the same confidence in these effusions as in Pepys's Diary, which was never meant to meet even the eye of a wife, and therefore conceals nothing that she ought not to know. The headache might perhaps have been traced to a second bottle at the Chancellor of the Exchequer's, in which the preceding letter indicates that Mr. Attorney had indulged, although he was afterwards to plead before the Chancellor :—

"Nov. 4, 1742.

"My Dear,—The Bishop is come very well, after a pleasant journey. I wish I had seen you come in at the same time; but I must wait. I can't easily believe that the excess of joy on our meeting will make amends for the uneasiness I feel by your absence. I'll bear it, however,

<sup>1</sup> See Lives of the Chancellors, vol. v. ch. cxl.

as well as I can. But you have not yet told me the utmost period of your stay. Let me know it, that I may be able to see to the end of my sorrow, and have the daily pleasure of counting the end of its approach.

"You bid me tell you every post how my health stands, which is of more moment to me as you are interested in it. I am obliged, therefore, to let you know that I have had the headache all day. You will expect, I know, an account how it came. I believe it was owing to my quitting my full-bottom and gown, without an equivalent, at the Chancellor of the Exchequer's. I am sorry to give you the trouble of hearing this; but I am bound to be ingenuous and make a true confession. I fear I shall not be completely careful of myself till you come and give that cheerfulness to my spirits which makes me think it worth while to be well, as I hardly do while you are absent.

"Adieu, thou best of women,  
"D. R."

The next letter accompanied the coach and four heavy blacks by which she was to be conveyed to London. The vehicle was to be four days in going to Bath, and four days in coming back,—and there was yet no quicker transit for a family; post saddle-horses were provided on the principal routes for cavaliers, but those who travelled in their own coaches were, for years after, obliged to perform the whole journey with their own cattle.

"Tuesday.<sup>1</sup>

"My Dear,—The coach goes to-morrow morning. I am impatient till it returns. We have never been separated so long. How do you like it? It is a solitude very different from that which I had before we were united, when I did not know the happiness of such a union.

"I am just come from the House. The great attack was not made to-day. I understand our enemies can't yet agree about it. We, however, expect it soon, but without fear. Their strength is tried to-day, though in a lesser matter. A Tory petition against the sitting Member for Derby was presented to-day. They would have it brought to the bar of the House, which was debated about an hour, and we rejected it by a majority of 235 against 190. We look upon this as a stronger question against us than any they can make on their intended motion.<sup>2</sup>

"My dear, I have the greatest satisfaction in the thought of seeing you so soon. Think of me, and believe that I am and always shall be, with the greatest tenderness,

"Your affectionate husband,  
"D. R."

"P. S. Your thoughts about not dining on the road and making four days of it, fall in with what I wrote to you yesterday."

I close my specimens of this conjugal correspondence with an extract

<sup>1</sup> Indorsed "Nov. 30, 1742."

<sup>2</sup> It was on election petitions, the merits of which were not at all regarded, that the strength of parties was chiefly tried. A few months before, Sir Robert Walpole had been turned out by an unfavorable division on the petition complaining of an undue election for Chippenham. (Jan. 28, 1742.)



from the last letter he wrote to her during this separation, which would be received by her as she stopped for the night on her approach to London:—

“Friday, December 3.

“My heart leaps for joy at the thought of the time of your return being so near. I can hardly think of any thing else, except when business calls me off. We had another attack to-day by a motion for a Place Bill. It seems principally calculated to abuse Sandys and his companions, the new comers, by forcing them to eat their own words of the last session. However, they can digest them with their places. We carried it in the negative by 221 to 196. This you will say is not a great majority. The truth is, some people are hard put to it to distinguish between this session and the last; others are afraid of their boroughs; others think it is a popular thing, and have a mind to seem patriots. So that many who are with us in other things deserted us here.”

The amiable lady to whom these letters were addressed was deeply afflicted by the loss of her husband, the Chief Justice; but the disappointment in never wearing the coronet upon which she had received so many congratulations was no aggravation of her sufferings. Her exemplary piety triumphed over her grief for her bereavement, and she survived her husband many years.

I have already told how their son was at last ennobled. His son Dudley, by the daughter of Terriek, Bishop of London, was a most distinguished statesman and orator,—filled high offices in the reigns of George III. and George IV.—was created Vis- [A. D. 1809.] count Sandon and Earl of Harrowby,—and might have been Prime Minister if he had pleased. The Chief Justice is worthily represented by the present Earl, his great-grandson, who after having long served in the House of Commons as member for the important commercial constituency of Liverpool, is adding in the other House of Parliament to the splendor of the name he bears—so that old Sir Dudley must now rejoice over the entire fulfilment of his grandfather’s prophecy.

## CHAPTER XXVIII.

### LIFE OF CHIEF JUSTICE WILLES.

BEFORE devoting myself to my last and most illustrious Chief Justice of the King’s Bench, Lord Mansfield, I must beg leave to introduce two Chief Justices of the Common Pleas, each of whom refused the great seal of Great Britain, the one being the most ambitious lawyer of the 18th century, and the other the least ambitious of all the lawyers recorded in our juridical annals,—CHIEF JUSTICE WILLES, and CHIEF JUSTICE WILMOT.

I have no respect for the former, and I shall dispatch him very rapidly. Although a man of splendid abilities, he was selfish, arrogant, and licentious; and, although at one time there was a strong probability that he would play a very important part in public life (in which case an interest would have been cast upon his early career,) he died disappointed and despised. Among the bright legal constellations he twinkles a star of the tenth magnitude, and he does not deserve to be long examined by the telescope of the biographer.

The Chief Justice himself affected to derive his name from VELLUS or VILLUS, and tried to connect his ancestor with the ARGONAUTS who carried off the GOLDEN FLEECE;—while his detractors preferred the etymology of VILIS or VILLICUS, and insisted that if the individual of his race who first bore a surname was not a *vilain*, he was not higher than the *bailiff* of the lord of a manor. In sober truth, the Willes's were a respectable family of small estate, long seated in the county of Warwick. For centuries they had been contented to plough their paternal acres, occasionally sending off a younger son to be an attorney or a country parson; but they suddenly rose into distinction, for while the "Head of the House" (as he loved to call himself) was a Chief Justice, and almost Lord Chancellor, his younger brother sat in the House of Lords as a Bishop."<sup>1</sup>

Of the lawyer, till he entered public life, it will be enough to relate that he was born in 1685; that he was educated at Lichfield Free Grammar School, and Trinity College, Oxford; that he was called to the bar in 1707; that from his youth upward he showed a wonderful combination of steady application to business and striking gravity of manner with extreme profligacy of conduct; and that his determination was to reach the highest honors of his profession at any sacrifice of money, of ease, of principle, and even of pleasure.

His success at the bar was respectable, but not such as to enable him to rely on professional reputation. So he resolved to plunge into politics, and on the dissolution of parliament in 1722, he declared himself a candidate for Weymouth, long one of the most venal and most expensive boroughs in England. After a severe contest, which cost him more than all he had been able to save from his fees, he was returned, and joyfully took his seat in the House of Commons.

As Sir Robert Walpole had gained undisputed power on the death of Lord Sunderland, Willes enlisted himself under the banner of the new minister, and hoped to gain favor not only by making himself useful in parliament, but by a rich stock of facetious stories, in which his patron took delight, and which, as the second bottle was going round, he could bring out with redoubled effect from his usual starchiness of demeanor. At first every thing turned up to his mind. Without making any dashing speech, he was serviceable to Government; he assisted in carrying

<sup>1</sup> The Right Rev. Edward Wiles, D.D., successively Bishop of St. David's and of Bath and Wells, consecrated in 1742—died in 1773.

<sup>2</sup> In subsequent parliaments he was returned at a small expense for the close borough of West Looe.

through the House of Commons the proceedings against Bishop Atterbury and the bill for doubly taxing Roman Catholics,—and he added to the popularity of the Government by distantly rivalling Sir Robert himself, after the ladies had withdrawn, in drawing forth loud roars of laughter from the squires who had been invited to dine at Chelsea. Accordingly, before two sessions had expired, such merits were rewarded with a “Welsh wig;” he was appointed “Second Justice of Chester,” and he thought the great seal within his grasp. But, afterwards, his patience was long and cruelly tried, and many bright gleams of hope were succeeded by the alternating gloom of despondency. When he had been eleven years in parliament he was still only “Second Justice of Chester.” Nevertheless he could not complain of being ill-used, for he did not expect to supersede Sir Philip Yorke, who had long been Attorney General; and although the office of Solicitor General had twice become vacant, he did not deny the superior claims of Sir Clement Wearg and Mr. Talbot. One of these competitors was removed by a premature death,<sup>1</sup> another succeeded Lord Raymond as Chief Justice of the King’s Bench, and the third obtained the great seal on the resignation of Lord King.

Willes at last got the step which he thought insured him all else that he desired;—and to crown his present felicity, at the same time that he was constituted Attorney General [Nov. 30, 1733.] he was promoted from “Second” to be “Chief Justice of Chester,”—the duties of law officer of the Crown, and of a Judge in this County Palatine and in the principality of Wales, not being considered incompatible.<sup>2</sup>

Soon after, it was thought that the Administration was in danger from a coalition brought about by Lord Bolingbroke, between the Tories and the discontented Whigs. Their grand movement was an attack upon the SEPTENNIAL ACT, which the Tories had always strenuously opposed, and which Whigs not in office, nor likely to be, although they formerly supported it, had lately discovered to be highly unconstitutional. In the famous debate on Mr. Brom- [MARCH 13, 1734.] ley’s motion for leave to bring in a bill to repeal it, Mr. Attorney General Willes, afraid of being speedily shorn of his new honors, made an extraordinary exertion, and delivered a speech which was very much applauded. I give a few extracts from it to show how such topics, which still annually come before us, were treated a hundred years ago:—

“Gentlemen having been pleased to put us in mind of our ancient

<sup>1</sup> From “A Brief Memoir of Sir Clement Wearg,” published in 1843, by his relative, George Duke, Esq., of Gray’s Inn, barrister-at-law, he appears to have been a most learned, eloquent and excellent man. He died of a violent fever, in the prime of life, on the 6th of April, 1726, when he had been three years Solicitor General. He was succeeded by Talbot, afterwards Lord Chancellor.

<sup>2</sup> Down almost to the time when these jurisdictions were abolished, Sir William Garrow and Sir John Copley held, at the same time, the offices of Attorney General and Chief Justice of Chester. We have now lost the professional joke of the prime minister baiting his *rat-trap* with *Cheshire cheese*.

constitution; but it has been so often varied and improved, that they must be puzzled to fix the time when it was in that perfect state which we ought at present to adopt and forever abide by. Are we asked to go back to the wittenagemote, or to prelates and Barons,—without any representatives from counties, cities, or boroughs? or to prelates, barons, and representatives of counties, cities, and boroughs,—sitting together in one and the same assembly? Rather than admire the constitution when unformed and weak, I would admire it in its strength and vigor. Therefore I admire it as I find it, and I would rather go on to improve it than mar the improvements which it has received. Let me observe that at the Revolution there was nothing in the *Claim of Rights* or in the *Bill of Rights* about annual or triennial parliaments. When we read of the advantage of ‘frequent parliaments,’ we are to understand frequent *sessions* of parliament—not that the parliament is to be changed every session. We all know that the Triennial Bill was neither introduced nor promoted by the patrons of liberty or the real friends to King William’s government. The object of the measure was to distress that good prince, and the bill when passed was found to be of a dangerous consequence to the prosperity of the nation and to the quiet of the subject. At last the Septennial Act passed, which is the true medium between the unlimited common law prerogative of the Crown and the other extreme of statutably extinguishing every parliament after it has sat three years, whatever perils may arise in any particular crisis from there being no parliament, or from a general election. If King William had enjoyed the benefit of septennial parliaments, he would have carried on war and he would have negotiated peace with much greater advantage, he would have escaped the treaties for partitioning the Spanish monarchy which have been so much objected to, and he would have been better able to humble the power of France and to secure the happiness of this nation. I have reason therefore to say that the constitution has now reached its highest perfection. The alleged power of corrupting a parliament which sits long, we may know to be imaginary from the fact that King Charles II.’s Long Parliament, which at first was called the *Pensionary Parliament*, and was disposed to make him absolute, at last became so refractory that he accused it of a design to dethrone him, and he abruptly and [A. D. 1734–1737.] indignantly dissolved it. Short parliaments lead corruption. Corruption is not of one sort only; it appears in many shapes. An elector may be bribed without giving him money, and members of this House may be bribed without getting any place or preferment from the Government. If, to please his borough and to secure his next election, a member votes against his judgment, is not this bribery, and bribery the most degrading and pernicious? An honorable gentleman says that septennial parliaments are necessary to support falling ministers. Sir, I can only say that I have been travelling lately in many parts of England, and, wherever I have been, I have found the present ministers held in high estimation; insomuch that, when this parliament has set out its seven years, I am convinced that



another will be returned for seven years more, equally discerning, loyal, independent, and well-disposed as the present."

Mr. Attorney's speech gained him much credit, although the victory was chiefly ascribed to Sir Robert Walpole's,—in which he drew such a character of Bolingbroke that he made the Whigs ashamed of acting under him; and by which, according to Coxe, he drove the disappointed intriguer abroad, in despair of ever recovering any ascendancy in England.<sup>1</sup>

When Willes had been Attorney General three years, the office of Chief Justice of the Common Pleas fell vacant, and he accepted it,—far from suspecting that he was [JAN. 23, 1737.] thereby to be forever "shelved," but considering that it would prove, as it had before done, a stepping-stone to the woolsack. He had hardly been installed in this intermediary dignity when he thought that his fondest expectations were to be instantly realised, all England being thrown into mourning by the sudden death of Lord Chancellor Talbot. To his unspeakable mortification, although [FEB. 14.] he had continued in the good graces of the Prime Minister, and still played his part in retailing his old stories to the country squires, adding anecdotes of his own adventures, he was never once thought of for advancement on this vacancy. Whether Sir Robert Walpole dreaded that habits and conversation which he could not openly censure—for they were very congenial to his own—might not be quite suitable to the grave magistrate who was to be placed in [A. D. 1737.] the "marble chair" and to preside over the general administration of justice, I know not; but he immediately offered the great seal to Lord Hardwicke, then Chief Justice of the King's Bench; and, upon this grasping aspirant trying to make too hard a bargain in demanding pensions and tellerships, he threatened to go to Fazakerley, a professed Tory lawyer and suspected Jacobite, saying, as he took out his watch, "It is now twelve o'clock; if by one you do not agree to my terms,—by two, Fazakerley will be Lord Keeper, and one of the staunchest Whigs in England." The treaty was instantly concluded; and very probably there was a secret article in it that Willes should not even be promoted, as he might naturally expect to be, to the office of Chief Justice of the King's Bench; for Lord Hardwicke was jealous of him, hated him, and wished to be succeeded by some safe man, like Mr. Justice Lee, who never would be formidable as a rival.

Willes henceforth entirely renounced all intercourse with Sir Robert Walpole, and entered into a political connection with the leaders of opposition, particularly with Lord Carteret. [A. D. 1742.] When the division on the Chippenham election showed that a change of government must inevitably take place, he believed that the Chancellor would go out with the Prime Minister, and that his own elevation was at hand. But, to the surprise of mankind, Pulteney refused to take

<sup>1</sup> 9 Parl. Hist. 394—479; Coxe's Memoirs of Sir R. Walpole, p. 426; Lord Mahon's History, ii. 264—272.

office himself, and consented to the Duke of Newcastle and Lord Hardwicke—whom he had often abused so bitterly—still holding their places.

The only game left to Willes was to try to create jealousies between the new section of the Cabinet and the old. With this view he strove to stir up Carteret to claim the premiership, and to engross all the patronage of the Government. But this most accomplished though most flighty statesman, intent on diplomatic negotiations and royal smiles, had no steady ambition, and neglected all those smaller cares by which alone party influence can be acquired or retained. On one occasion, Willes calling upon him to apply for an appointment, "What is it to me," he [A. D. 1746.] cried, "who is a judge, and who is a bishop? It is my business to make kings and emperors, and to maintain the balance of Europe." "Then," answered the Chief Justice, "those who want to be judges or bishops will apply to those who will condescend to make it their business to dispose of judgeships and bishoprics."<sup>1</sup>

Willes, in fulfillment of his own prophecy, for sometime cultivated the Pelhams, but found that they were unalterably attached to Lord Hardwicke;—and then he professed himself an adherent of Pitt. In this weary round he often sank into low spirits, and the sensual gratifications which had soothed his political disappointments began sadly to pall upon him.

At last, the dreams of power, in which alone his imagination now [Nov. 1756.] luxuriated, seemed actually fulfilled. In truth, the grand object of his ambition was placed within his reach, and he lost it by his own gross mismanagement, so that he was left without the consolation of complaining of his evil fortune.

When the Duke of Newcastle and Lord Hardwicke were driven to resign, the ministers who, for a short time, inadhesively formed the new cabinet under the nominal leadership of the Duke of Devonshire were favorably inclined to Sir John Willes, and adopted him as their principal legal associate, relying upon him to counteract the machinations of VOLPONE, who, he said, had unjustly kept him out of the office of Chancellor for twenty years.<sup>2</sup> But, on account of the prejudices of the King, who had falsely been told that the Chief Justice of the Common Pleas had in him as little *law as morality*, there was a serious difficulty in at once conferring upon him the dignity to which he aspired. An arrangement was made that the great seal should be a short time in commission, that he should be first commissioner, and that it should, ere long, be transferred to his sole custody, with the title of Lord Chancellor, or Lord Keeper, and a peerage. Accordingly, on the 19th day of November, 1756, he took his seat in the Court of Chancery, and saw the mace and the embroidered purse containing the great seal lying before him; but he was galled by the thought that he enjoyed only divided

<sup>1</sup> Horace Walp. Mem. of Geo. II. i. 147.

<sup>2</sup> "Lord Chief Justice Willes was designed for Chancellor. He had been raised by Sir Robert Walpole, though always browbeaten by haughty Yorke, and hated by the Pelhams, for that very attachment to their own patron. As Willes's nature was more open, he returned their aversion with little reserve, He was not wont to disguise any of his passions."—Walp. Mem. Geo. II. i. 76.

empire, for Sir Sidney Stafford Smythe was on his right hand, and Sir John Eardley Wilmot on his left, with co-ordinate authority.

Lord Chief Commissioner Willes did the business of the court with much ability, and a general expectation was entertained that he was to turn out an eminent equity judge. He likewise reformed the scandals of his domestic establishment, and every obstacle to his elevation seemed removed.

The horizon was for a time overcast, on the dismissal of Mr. Pitt and the dissolution of the Duke of Devonshire's short and ill concocted government; but a brighter sunshine irradiated the steps of Sir John Willes when the famous coalition was completed between Mr. Pitt and the Duke of Newcastle. These chiefs, without feeling any attachment to him, were both contented, for the sake of convenience, that he should be admitted into the cabinet, and should be created Lord Chancellor.—To please the King, they first offered the great seal to Lord Mansfield, knowing full well that he would decline it; and likewise to Sir John Eardley Wilmot, from whom they were sure to receive a similar answer, though for very different reasons. The tender was then to be made in due form, and with the King's express authority to Sir John Willes; but his Majesty was, as yet, in very ill humor, on account of his closet being stormed by the "Great Commoner," and he positively declared that no new peerage should then be created. The First Lord Commissioner was much nettled by hearing that the great zeal had been hawked about when he had considered that it was his own exclusive property.—Further, knowing how it had been declined by all who were regarded as capable of holding it, he gave himself very haughty airs, thinking that the game was irrevocably in his own hand. Therefore, under the disguise of disliking the proffered elevation, he talked of the comfort and security of the "cushion of the Common Pleas," dwelt upon the sacrifice which he was called upon to make, and positively refused to accept the great seal unless he had the promise of a peerage, which had been given to every Lord Chancellor and Lord Keeper since Sir Orlando Bridgman in the reign of Charles II.<sup>1</sup> The conference was broken up; but Willes, though very indignant, was perfectly confident that his terms must be acceded to, and he remained at home in the belief that he should speedily receive a summons to be sworn as Chancellor, with a request to know what title as a baron would be agreeable to him.<sup>2</sup>

Mr. Pitt, who had secured to himself unlimited power to carry on the war according to his own views, and anticipated his coming glory, was unwilling to run the risk of quarreling with the King upon such a paltry point as a legal peerage; and, instead of making any further

<sup>1</sup> He chose to forget Sir Nathan Wright in the reigns of William III. and Queen Anne.

<sup>2</sup> A story was circulated, but I believe without any authority, that he had fixed upon the title of LORD COLCHOS; that he meant to have the ARGO galley for his crest, a "fleece *or*" to be added to his arms, and two argonauts for his supporters. Horace Walpole merely says, in his usual epigrammatic style,— "Willes proposed to be bribed by a peerage to be at the head of his profession; but could not obtain it." (Mem. Geo. II. ii. 226.)

effort to gratify Sir John Willes, he offered the great seal to Sir Robert Henley, who, belonging to the Leicester House party, had hitherto been reckoned an enemy, but who was not likely to stand out for conditions, reasonable or unreasonable, and who, from his very moderate abilities, could never be formidable. Henley, who had not expected such an offer from the new ministry any more than to be made Archbishop of Canterbury, joyfully jumped at it, without saying a word about peerage, pension, or tellership; and the arrangement was completed the very same morning that it was first proposed. The Lord Keeper elect then thought that he could not do less than announce his appointment to the First Lord Commissioner who had the custody of the great seal, and courteously arrange with him as to the convenient time when the bauble might be transferred to him. Willes was at his villa, walking about in the garden, still chafed by the affront which he considered he had received, but still not doubting that the proper *amende* would be made to him. He knew that Henley could not well be the messenger for that purpose, but he had not the most distant conception that his visitor had a personal interest in the controversy; and, without leaving any opening for the intended communications, he burst out into a statement of his grievances, thus concluding: "Would any man of spirit have taken the seals under such circumstances? would you, Mr. Attorney?" Henley, thus appealed to, gravely answered, "Why, my Lord, I am afraid it is rather too late to enter into such a discussion, as I have now the honor of waiting upon your Lordship to inform your Lordship that I have actually accepted them."

Poor Willes never held up his head again;—and he received another blow, which utterly crushed him, when Lord Keeper Henley, preparatory to the trial of Lord Ferrers for murder, was, without solicitation, created a peer, that he might preside on the occasion as Lord Steward.

The death of George II., the prelude to so many changes, brought no [MARCH 27, 1760.] consolation to the heart broken Chief Justice; for Henley, from his long connection with Leicester House, was a personal favorite with the new Sovereign, and was not only allowed by him to get tipsy after dinner instead of holding evening sittings, but was raised to be Lord Chancellor from being only Lord Keeper, and was created Earl of Northington.<sup>1</sup> Friends in vain attempted to soothe the wretched Chief Justice, by reminding him of the vanity of worldly greatness, by pointing out to him that he ought to be satisfied with the measures of prosperity he had enjoyed, and by advising him, in estimating his success in life, to think rather of the many competitors whom he had surpassed than of the few who had been enabled to surpass him. But he answered in the words of Sir Christopher Hatton to Queen Elizabeth, "All will not do: no pulleys will draw up a heart cast down." For several terms before his death he was unable to go into court. He languished till the 16th of December, 1761, when he expired at his house in Bloomsbury Square, in the 76th year of his

<sup>1</sup> Lives of the Chancellors, vol. v. ch. cxi.



age. He was buried with his ancestors in the family vault at Bishop's Ickington, in Warwickshire.

I am afraid I may be blamed for neglecting his judicial decisions, but I cannot discover any important points which he ruled, although he presided for so long a period in one of the superior courts in Westminster Hall. There is said to have been very little business in the Court of Common Pleas in his time; a circumstance thus accounted for by Horace Walpole:—

“He had great quickness of wit, and a merit that would atone for many foibles—his severity to, and discouragement of, that pest of society, attorneys. Hence his court was deserted by them, and all the business they could transport carried into Chancery, where Yorke’s filial piety would not refuse an asylum to his father’s profession.”<sup>1</sup>

I believe that, notwithstanding his immoralities, he was a sound lawyer, that his administration of justice was pure and impartial, and that his fame as a magistrate would have been splendid in proportion to the opportunities enjoyed by him of showing his powers and acquirements. He either had extraordinary authority with his *puisnies*, or extraordinary discretion in yielding to the best opinion propounded by any of them and in persuading the others to acquiesce in it. A case [A. D. 1757.] occurring in which the Court was divided, he said, “I think myself unfortunate whenever I differ in opinion with any of my brethren: however, I have the pleasure to reflect that, in the twenty years I have sat here, this is but the third time that there has been any difference of opinion between any of us.” They appear to have been unanimous ever after.<sup>3</sup>

Chief Justice Willes sat along with the other Judges on the trial of the rebels at St. Margaret’s Hill, Southwark;<sup>3</sup> but he was not called upon to take any leading part,—Lee, Chief Justice of the King’s Bench, being present; and he had nothing to do with any [A. D. 1746.] other state prosecutions.

The most interesting case which ever came before him was that of Elizabeth Canning, which divided and agitated the country [A. D. 1753.] almost as much as the Catholic Question or the Reform

<sup>1</sup> Mem. Geo. II. i. 76. This is a spiteful allusion to Lord Hardwicke having been the son of an attorney. But the suggestion that the business which ought to have come into the Common Pleas was done in the Court of Chancery, shows that the memoir-writer is entitled to very little weight on such a subject.

<sup>2</sup> The case referred to is *Buxton v. Mingay*, 3 Wilson, 70, well known and very distasteful to medical men; the question being, “whether a surgeon is an *inferior tradesman* within the meaning of 4 & 5 W. & M. c. 23, s. 10?” The Chief Justice took the liberal side, saying—“I am clearly of opinion the legislature could never intend that a surgeon is ‘an inferior tradesman,’ or a ‘dissolute person;’ although he may sport without being qualified to kill game.” But said Bathurst, J.,—“I can never be of opinion that the legislature intended to permit every master of every little mechanic trade to neglect his trade and go a-hunting. I am of opinion that every tradesman is *inferior* who is not *qualified*, and that is the only line we can draw between inferior and superior.” Clive, J., concurred with him.—I know not in what category they would have placed “an *unqualified judge*,” but I should call him “an inferior tradesman.”

<sup>3</sup> 18 St. Tr. 329.

Bill in more recent times. He very sensibly agreed with the jury, who convicted her of perjury; he refused her a new trial, and he proposed that she should be transported beyond the seas for seven years. Generally, the Lord Mayor and aldermen, who are in the commission at the Old Bailey, implicitly submit to the opinion of the judges, as well in awarding punishment as in disposing of questions of law; but, on this occasion, Alderman Sir John Barnard moved an amendment, "that the punishment should be only six months' imprisonment," when a *poll* was taken, and the sentence proposed by the Chief Justice was carried by a majority of eleven (including six judges) against eight (who were all aldermen.) Willes appears to have conducted himself on this occasion with firmness, good temper, and dignity.<sup>1</sup>

He did nothing to wipe off the reproach cast upon the English bar for a contempt of literature; for he not only never wrote a page for the press in prose or rhyme, but he did not at all mix with men of letters, and his talk was either about law or lewdness. I am sorry to say that the accounts handed down to us of his private life are lamentably unfavorable as far as morality is concerned. Even according to the low standard which then prevailed, he was grossly peccant; and, however little censorious the age might be, his conduct seems to have been severely condemned. Although a married man, with a grown-up family, there were violations of decorum under his own roof which transpired and gave very general offence. Every memoir-writer who notices him gives the following anecdote, which, therefore, I may not omit. A dissenting clergyman, shocked by the rumors which he heard of Lord Chief Justice Willes' domestic establishment, called to remonstrate with him, and, if possible, to stir him up to repentance. After some allusions, which, though intelligible enough, the Chief Justice pretended not to understand, this dialogue ensued:—*Minister*: "To come to the point, then, my Lord, they say that one of your maid-servants is now with child." *Chief Justice*: "What is that to me?" *Minister*: "But, my Lord, they say that she is with child by your Lordship!" *Chief Justice*: "What is that to you?"<sup>1</sup>

John, his eldest son, sat in several parliaments for Aylesbury and Banbury, but gained no distinction; and Edward, his second son, who was bred to the bar, although for some time Solicitor General and a Puisne Judge of the King's Bench, was of slender intellect, insomuch that once,

<sup>1</sup> 19 St. Tr. 262—694. This is one of the most extraordinary cases of popular delusion on record. Although the romantic story which Elizabeth Canning had told of being stolen by a gipsy woman, whom she tried to hang for the purpose of concealing her own elopement with a lover, was disproved by the clearest and most irrefragable evidence, and by the wholly contradictory accounts which the girl herself had given of it, more than half the nation stood up for, and believed in her innocence; and innumerable pamphlets were published for her, as well as against her.

<sup>2</sup> Horace Walpole, who relates the story, says that, in addition to "an unbounded passion for women," he was "notorious for *gaming*;" but I do not find this imputation cast upon him by any other writer, and it is wholly inconsistent with his regular application to business. See Mem. Geo. II., i. 76.

when pleading a cause, and being checked for wandering from the subject, he exclaimed, "I wish you would remember that I am the son of a Chief Justice;" upon which old Mr. Justice Gould answered, with much simplicity, "Oh, we remember your father, but *he was a sensible man.*"

Chief Justice Willes's heirs in the male line have all been extinct, but many distinguished persons still flourishing are descended from him through females. If by good luck he had actually reached the woolsack, this descent would have been considered a great honor; but it is difficult to say why there should have been such a difference merely from his having pronounced a certain number of equitable decrees, good or bad, and having been commemorated in several volumes bound in calf-skin and entitled "REPORTS TEMPORE LORD CHANCELLOR WILLES." Had he suspended his claim to a peerage, all this glory, by which the eyes of lawyers are dazzled, would have been showered down upon him.

## CHAPTER XXIX.

### LIFE OF CHIEF JUSTICE WILMOT.

WILMOT, a succeeding Chief Justice of the Common Pleas, enjoyed the remarkable distinction of being a lawyer without ambition, and more than once refused the great seal,—not from any haggling about the terms on which he should accept it, nor from any dread of its precarious tenure, or calculation that he might enjoy more power and wealth by remaining in the position which he occupied, but from a genuine contempt of power and of wealth as well as of titles, and an ardent love of leisure, repose and obscurity. Although he certainly was altogether free from the last infirmity of noble minds, and of the sin by which the angels fell, we may lament that he never displayed those high aspirations and heroic efforts to be of service to others which make ambition virtue.

John Eardly Wilmot was the second son of Robert Wilmot, a gentleman of respectable family and moderate fortune in the county of Derby. His mother was daughter and co-heiress of Sir Samuel Murrow, a Warwickshire baronet. He was born on the 16th of August, 1709. Having received the first rudiments of his education at a school in Derby, he was sent to the free school at Lichfield, under the tuition of Mr. Hunter, who is celebrated for having flogged seven boys who afterwards sat as judges in the supreme courts at Westminster at the same time.<sup>1</sup> Samuel Johnson, who had likewise been subjected to his flagellation, gave this

<sup>1</sup> Among these, besides Wilmot, were Lord Chancellor Northington, Sir Thomas Clarke, Master of the Rolls, Chief Justice Willes, and Chief Baron Parker. Lord Mansfield is generally included in the list; but he never saw the city of Lichfield till he had been called to the bar.

account of him:—"The head master was very severe, and wrong-headedly severe. He used to beat us unmercifully; and he would beat a boy equally for not knowing a thing or for neglecting to know it. He would call up a boy and ask him Latin for a *candlestick*, which the boy could not expect to be asked. While Hunter was flogging his boys unmercifully, he used to say, '*And this I do to save you from the gallows.*'"<sup>1</sup> However, under such harsh discipline young Wilmot, like young Johnson, became an excellent Latin scholar, and was imbued with a love of learning. It is remarkable that, although they were several years class-fellows of Lichfield, there never seems to have been the slightest intercourse between them in after-life; but the Chief Justice used frequently to mention the Lexicographer as "a long, lank, lounging boy, whom he distinctly remembered to have been punished by Hunter for idleness."

When David Garrick, who was at the same time a very little boy in the lowest form, made his first appearance in Goodman's Fields, in October, 1741, Wilmot went to applaud him, and, having often afterwards gone to admire him in his various parts, was present at his last performance at Drury Lane in June, 1776, when he took a final leave of the stage; but there was no private intimacy between them, notwithstanding David's passion for legal dignitaries, which made him pride himself so much upon his friendship with Lord Camden and Lord Mansfield.<sup>2</sup> This was probably Wilmot's fault, for he was not only afraid of being distinguished himself, but he wished to avoid those who had gained distinction.

After he had been some years under Hunter at Lichfield, the better [A. D. 1724.] to prepare him for the University, he was removed to Westminster School; and here he applied diligently to his books, without ever mixing in the amusements of his schoolfellows.

He spent the next four years as a recluse student at Trinity Hall, Cambridge. His ruling passion was to enter the Church, in the hope of obtaining a small living, and spending his days in a remote part of the kingdom, conversing only with the peasants who might be under his pastoral care. His father, however, who appreciated his vigorous talents and his solid acquirements, would by no means agree to this scheme, and insisted on his entering the profession of the law. The dutiful son submitted, though reluctantly, and, before he left Trinity Hall, was initiated in the Roman Civil Law—a study for which this place of education has been always renowned, and to which he afterwards ascribed his proficiency in the Common Law of England.

In the mean while he kept terms in the Inner Temple, and after three years' residence there he was called to the bar. We are left entirely in ignorance of the plan of study which he pursued, except it was solitary;

<sup>1</sup> Boswell, i. 21–22. Johnson had so high an opinion of the good effects of such severity, that when he heard of a schoolmaster having abolished flogging, he exclaimed, "I am afraid that what his boys gain at one end they will lose at the other."

<sup>2</sup> Boswell, iii. 336.



but we know that, without going into an attorney's office, or attending much in court, or appearing at the "Readings," which were still kept up, he rendered himself a consummate jurist. Instead of being vain of his acquirements, he was earnestly desirous of concealing them; as if afraid that the attorneys, hearing of his familiarity with black-letter learning, should send him retainers.<sup>1</sup> He was exceedingly successful in gaining his wishes, and for many years he was allowed to remain unmolested. But going the Midland Circuit, in spite of all his efforts he had a little business from family connections in his own county: avoiding display as much as possible, he was on several occasions compelled to show what there was in him,—and by and by, at the Derby Assizes, he was in every cause. Still he contrived to preserve his obscurity in London, till, arguing some demurrers and new trials in causes from his circuit, he was at last betrayed to Westminster Hall as a deep lawyer and powerful advocate.

Sir Dudley Ryder, the Attorney General, thereupon appointed him "Treasury Devil;" and, deriving important aid [A. D. 1742–1752.] from his services, and being very desirous to bring him forward, mentioned him to the Lord Chancellor as a man who might be an ornament to the profession, and would one day show himself qualified for the highest judicial station. In consequence he was offered a silk gown. Secretly resolved to refuse it, he wished to have some countenance in the opinion of a friend whom he pretended to consult,—and to whom, after very clearly disclosing his inclination, he said: "Consider it well, and tell me what you think of it, for when I have once hoisted the sail I cannot take it down again: therefore it requires a proper consideration and digestion in every respect. The withdrawing from the eyes of mankind has always been my favorite wish; it was the first and will be the last of my life. His friend advised him "*to hoist the sail, sure of a trade wind*;" but, against all remonstrances, he said he would not go within the bar to contend with the King's Bench leaders. It was then proposed to him that, if he would take the coif, he should immediately have the rank of King's Serjeant; the encouraging remark being added that, "in the drowsy confines of the Common Pleas he might remain without any unpleasant collision or notoriety." But he declared his immutable determination "to live and die in a stuff gown."<sup>2</sup>

<sup>1</sup> There was a valued friend of mine, now no more, who went the Oxford Circuit for years *pour passer le temps*, but who had a horror, which was well known, of being professionally employed. At last he affronted an attorney by making him, rather unceremoniously surrender a place in court when a very interesting trial was coming on, saying that "barristers only were entitled to sit there." The retreating attorney was heard to mutter, "I will have my revenge of him." So, the same night, he sent a brief in an important cause to his antagonist; who returned it with a message that he had been sent for on urgent business to London. The frightened barrister left the assize town early next morning, and never again appeared upon the circuit.

<sup>2</sup> Some accounts say that he called this his *Domino*, and that, like Rabelais, he repeated the text "*Beati sunt qui moriuntur in Domino*."

He was once, sorely against his will, obliged to lead for the defendant in an action for *crim. con.* falsely brought against an old school-fellow, who insisted on having him for his counsel. As the trial proceeded, he got over his nervousness, and delivered an excellent address, which carried the verdict. The parties living near Lichfield, David Garrick took a lively interest in the result, and attended in court, planting himself in a snug corner where he expected to remain unobserved. The following is the account he delivered of the performance of his old schoolfellow:—

“There appeared much contradiction and confusion in the evidence given by the witnesses, till at length rose Mr. Wilmot, who immediately explained the whole in so clear and animated a manner as to charm as well as inform every one who heard him. I was delighted with the wit and sprightliness with which he unravelled the affair,—pluming myself upon being quite private and unnoticed in so great a crowd, and little thinking that I should be soon brought upon the stage myself. But the counsel, having developed the plot which had been laid against his client, observed, ‘In short, gentlemen of the jury, it is nothing more than the story of *The Intriguing Chambermaid* and *The Lying Valet*.’<sup>1</sup> And, immediately casting his sparkling eye upon me in my retired corner, in a moment he drew the whole notice of the Court upon me, and I thought I should have sunk into the earth.”

Horace Walpole relates, that, appearing at the bar of the House of Commons as counsel in the Wareham election, he was reprimanded by Pitt, who said that “he brought with him the pertness of his profession;” and that, being prevented by the Speaker from replying in his own vindication, he threw down his brief, and declared that “he never would plead there again.”<sup>2</sup> But I doubt whether Wilmot ever was in this line of practice, and I am convinced that he was not the man to wish to gain *éclat* by such a conflict.

We certainly know that he had the opportunity of revenge if he felt injured, but that he declined it. An offer was made to him of a seat in the House of Commons free of expense. Such a lucky chance—although lawyers, when Queen Mab gallops over their fingers, dream of it still more than of fees—he despised. He equally disliked the notion of making a speech either as a patriot or as a courtier: he might have remained silent in the House, but he foresaw that his health would be proposed as one of the members for the county, and that wherever he appeared he would be asked for a frank. The notion suggested to him that parliament might speedily make him a law officer of the Crown, filled him with consternation.

For ever to avoid all such perils and solicitations, he now took the [A. D. 1754.] decisive step of abandoning Westminster Hall altogether, and settling in his native county as a provincial counsel,—which, as he had been disappointed in his wish of being a country curate or vicar, offered him the prospect of almost equal seclusion. His

<sup>1</sup> These two farces, written by Garrick, were then acting with great applause.

<sup>2</sup> Mem. Geo. II., ii. 107.

father had left him a small patrimony, producing some hundreds a year; and he had married Sarah, the daughter of Thomas Rivett, Esq., of Derby, afterwards representative of that borough in parliament, with whom he had received a small portion yielding a few hundreds more.<sup>1</sup> Accordingly, he sold his chambers, took a house in Derby, and settled there with his family, never more expecting to see persons of more worship than the mayor of the town, or churchwardens who might come to consult him respecting the settlement of a pauper.

Near a twelvemonth passed over him and found him contented and happy in this retreat,—when, one fine spring morning, he received official information that his Majesty had been pleased to appoint him a Justice to hold Pleas before his Majesty himself—or, in other words, a Puisne Judge of the Court of King's Bench. This had been preceded by a rumor, which had reached Derby, that such an appointment was in contemplation; but this rumor he had wholly disregarded, as he not only never had solicited the appointment, but he had never been consulted about it, and it had never entered his imagination.

At first he declared that nothing should induce him again to revisit the smoke and noise of London,—but being told that, independently of all consideration of his increasing family, it was his duty to submit himself to the King's pleasure and to serve the public according to the best of his ability, he consented to allow the proposed honor to be thrust upon him. This was the doing of Sir Dudley Ryder, now Chief Justice of the King's Bench, who, on the vacancy occasioned by the death of Sir Martin Wright, was anxious to have by his side his old DEVIL, in whom he so much confided. Accordingly, in Hilary Term, 1755, Wilmot, having been called Serjeant, and knighted, took his seat as one of the Judges of the Court of King's Bench.

The appointment, although grumbled at by some pert practitioners who thought they were slighted by being passed over, was soon justified by the admirable manner in which the new Judge performed his duties. As unostentatious as ever, [A. D. 1755, 1756.] he still strove to shrink from observation; but, at times, he, in spite of himself (as it were), delivered pithy and luminous judgments,—and often it was observed that, by a hint, a whisper, or a look, he guided his brother judges—insomuch that, like one of his predecessors, he was compared to the helm which, itself unseen, silently keeps the vessel in her right course.

Not insensible to the respect which he created and the service he rendered, he was nearly reconciled to his new mode of life, when he was thrown into deep distress by the sudden death of his friend Lord Chief Justice Ryder while a patent was passing for ennobling him. [MAY 25.]

<sup>1</sup> This marriage took place in April, 1743, when the venerable Hough, Bishop of Worcester, then ninety-two years of age, writing to an aunt of the future Chief Justice, says, "I am much pleased that Mr. Eardly Wilmot has chosen a wife whose character you approve; 'tis an argument of his good sense that he looks not after money in the first place; for, if God gives him life and health, he cannot fail making his fortune."

A judicial crisis followed, which lasted some months; Mr. Murray, the Attorney General, claiming the office of Chief Justice, and the Duke of Newcastle trying, by solicitations and bribes, to keep him in the House of Commons. During this interregnum Sir Eardly Wilmot wished earnestly that he were again a provincial counsel in his small house at Derby, laying down the law to parish officers; for he was obliged often to take the lead in the Court of King's Bench, and, gaining great credit, notwithstanding his desire to be quiet, a rumor was spread, which reached him, that if Murray could be prevailed upon to forego his claim he himself was to be promoted to be Chief Justice. The two senior puisnies were Sir Thomas Denison and Sir Michael Foster, and they, though respectable men, were nearly disabled by age and infirmity.

To Wilmot's unspeakable relief, Murray prevailed, and, under the [Nov. 11.] title of Lord Mansfield, took his place as Chief Justice of the Court of King's Bench. These two profound lawyers and accomplished scholars, although of essentially different temperament, always cordially co-operated in the discharge of their judicial duties; and Wilmot, instead of feeling any envy, was delighted that he was at liberty to act a very subordinate part.

He had soon to encounter anew the perils of promotion. On the resignation of Lord Hardwicke, the great seal was put into commission, [Nov. 19, 1756.] and he was named as a commissioner along with Lord Chief Justice Willes and Sidney Stafford Smythe. He had never drawn a bill or answer in Chancery in his life,—but he was intimately acquainted with the Civil Law, and had scientifically studied every branch of English jurisprudence. All other cares being laid aside, he now devoted himself to Equity; and the old draughtsmen were obliged to acknowledge that, considering his defective training, he seemed to have by intuition a wonderfully correct notion of it. The rest of the profession and the public gave him unqualified praise, and a general expectation was entertained that he would soon be appointed Lord Chancellor or Lord Keeper, for he was not only much handier in dealing with the cases which came before the commissioners than either of his colleagues, but he was considered fitter for the office than Henley the Attorney General, or any one else who could pretend to it. Frightened out of his wits by the apprehension of the much-coveted bauble being offered to him, he thus wrote to his brother, Sir Robert Wilmot:—

“The acting junior of the commission is a spectre I started at, but the sustaining the office alone I must and will refuse at all events. I will not give up the peace of my mind to any earthly consideration whatever. Bread and water are nectar and ambrosia when contrasted with the supremacy of a court of justice.”

For this turn there was not any serious ground for the alarm, for the [JUNE 30, 1757.] promotion was only slightly proposed to him, and his refusal of it was easily acquiesced in. Political convenience prevailed over a strict consideration of the good of the suitors, and,—Chief Justices Willes having ruined himself by standing out for a



peerage,—to please the Leicester House party, the great seal was delivered to Sir Robert Henley, afterwards created Earl of Northington.

The ex-commissioner gladly returned to the King's Bench, resolved never again, either jointly with others or singly, to touch the "pestiferous piece of metal."<sup>1</sup>

For ten years he went on as a Puisne Judge of the King's Bench, only longing for some situation in which he might be less subject to public gaze. On one occasion, while presiding at the Worcester Assizes, he had been very nearly released from all dread of further promotion in this world. The following letter to his wife gives [A. D. 1757–1767.] the particulars of his danger and escape:—

"I send this by express, on purpose to prevent your being frightened, in consequence of a most terrible accident at this place. Between two and three, as we were trying causes, a stack of chimneys blew upon the top of that part of the hall, where I was sitting, and beat the roof down upon us; but, as I sat up close to the wall, I have escaped without the least hurt. When I saw it begin to yield and open, I despaired of my own life and the lives of all within the compass of the roof. Mr. John Lawes is killed, and the attorney in the cause which was trying is killed, and I am afraid some others; there were many wounded and bruised. It was the most frightful scene I ever beheld. I was just beginning to sum up the evidence, in the cause which was trying, to the jury, and intending to go immediately after I had finished. Most of the counsel were gone, and they who remained in court are very little hurt, though they seemed to be in the place of greatest danger. If I am thus miraculously preserved for any good purpose, I rejoice at the event, and both you and the little ones will have reason to join with me in returning God thanks for his signal deliverance: but if I have escaped to lose either my honor or my virtue, I shall think, and you ought all to concur with me in thinking, that the escape is my greatest misfortune.

"I desire you will communicate this to my friends, lest the news of such a tragedy, which fame always magnifies, should affect them with fears for me.

"Two of the jurymen who were trying the cause were killed, and they are carrying dead and wounded bodies out of the ruins still."

In another letter he says, "It was an image of the last day, when there shall be no distinction of persons, for my robes did not make way for me. I believe an earthquake arose in the minds of most people, and there was an apprehension of the fall of the whole hall."

His safety is supposed to have been entirely owing to his presence of mind, which induced him to remain composedly in his place till the confusion was over—a circumstance which, with his usual modesty, he suppresses.

He twice attempted, ineffectually, to exchange his present office for that of Chief Justice of Chester, which was of less emolument, but would have withdrawn him entirely from London; so careless was he of present applause, or of the fame to be acquired as a great magistrate.

<sup>1</sup> Description of the great seal by Lord Keeper Guilford.

Afterwards, to the surprise of all who knew him, he did accept a distinguished "supremacy" in Westminster Hall; but he [A. D. 1766.] truly said that "this was under *duress*." On the formation of the first Rockingham administration, when Lord Camden became Chancellor, he resolved to have Sir Eardly Wilmot to succeed him as Chief Justice of the Common Pleas. A rumor of this promotion having reached the person so selected as the worthiest, he wrote to his brother, Sir Robert—"Is it not possible for you to divert a measure which will be so injurious to my peace if accepted, and so much censured if refused?" But he received no comfort from the following answer:—

"The curtain is now drawn up; the actors are coming on the stage. [AUG. 2.] I understand you have a part which, though not your own choice, has been assigned to you in so distinguished, so honorable a manner that you certainly ought, and gratefully, to accept it. 'Tis a duty which you owe to the King, to your friends, to your family, to yourself; and the duty required is neither hard nor unprofitable. Lord Camden claims the sole merit of your advancement; Lord Shelburne's friendship for you may have had its weight; Lord Northington has likewise, probably, promoted the measure. Their motive is your eminent abilities in your profession, your extensive knowledge, your acute and deep penetration, your sound judgment, your principles in favor of liberty, your unspotted character, and your being in every respect the most fit and proper person for that station. I am clearly of opinion that your remove to the Common Pleas will be a fortunate and happy event. You will, at all events, be a permanent pillar, though the new ministry, as it probably will, topple down. Every mortal says how honorable it is for you to have no competitor. The whole town seems interested and pleased with the event, and the hopes of mankind would be disappointed if you rejected the public voice. You shall have free scope to write, or talk, or scold as much as you please to me. Sit but serene in your Chief Seat, and out of it you shall rage like Boreas"

But when Lord Camden's letter reached Sir Eardly, announcing that the King had graciously appointed him Chief Justice of the Common Pleas, his horror of promotion returned in full force. He was then on the Western Circuit; and he showed to Mr. Justice Yates, his brother judge, a letter he had written to refuse, with all respect and gratitude, the honor intended for him. This sensible and warm-hearted man, having in vain used many arguments to combat his resolution, at last made a little impression by urging that, as the Common Pleas had no criminal jurisdiction, and no state trials, a Chief there might be quieter and less observed than a Puisne in the King's Bench,—where Wilkes's outlawry was agitated, and "libel" was the staple commodity. He then, with his own hand, wrote a letter of acceptance, addressed to the Chancellor in Wilmot's name, and by gentle force induced him to sign it.

At the end of the circuit the new Chief Justice was sworn in as Chief Justice of the Common Pleas, and received the following congratulatory epistle from the friend whose *duress* had compelled him to suffer this elevation:—

"Clifton, Aug. 30, 1766.

"My dear Lord Chief Justice,—I have now the satisfaction of addressing my friend by the title I so ardently wished him; and blessed as you are with the liveliest feelings of a friendly heart (one of the greatest blessings that man can enjoy), don't you envy me the joy I feel from this event? I should, indeed, have been heartily chagrined if you had missed it; and, had the fault been your own, should have thought you exceedingly blamable. My casuistry would then have been staggered indeed, and would have found it a difficult point to excuse you. But now it is quite at peace and entirely satisfied. You do me great honor in rating it so high, and I am sure you speak from the heart. It is the privilege of friendship to commend, without the least suspicion of compliment: and I shall ever receive any approbation of *yours* with superior satisfaction. But no man breathing can have a surer guide or a higher sanction for his conduct than my friend's own excellent heart. Of this the very scruple you raised would alone have convinced me if I had no other proofs. I have not the least doubt that you will find your new seat as easy as you can wish, and *all* your coadjutors perfectly satisfied. There is but one of them that could entertain any thoughts of the same place for himself; and as he knows that in the present arrangement he had not the least chance of it, I dare say he will be pleased to see it so filled. And as to the rest of the profession, I can affirm with confidence (for you know I have but lately left the bar, where I had a general acquaintance with the sentiments of the Hall), that no man's promotion would have given so universal satisfaction as yours. I repeat this to you because it certainly must give you pleasure. Success is never more pleasing than when it is gained with honor and attended with a general good will. It will rejoice me highly to shake your hand before I go northwards; and if I knew what day you would be at Bath, I would give you the meeting there. I long to hear a particular detail of everything that has passed.

"Your most affectionate friend,

"J. YATES."

Nauseated by the formal and fulsome letters addressed to him on this occasion, he was much pleased with the following from the celebrated "Commentator on the Laws of England," with whom he had always been on terms of familiarity and friendship, and who had himself fair pretensions to the promotion:—

"My Lord,—Among the many congratulations you receive upon a promotion which every body is pleased with, even in these times of division, there are none more sincere than those which come from your Lordship's acquaintance, who have an opportunity of contemplating your private as well as public character. As your Lordship has been pleased to honor me with that advantage in a degree that has laid infinite obligations upon me, you will believe that it is with real pleasure I felicitate both your Lordship and Westminster Hall on an event that does honor to both.

"I am, &c.

"W. BLACKSTONE."

The prospect held out to him of a quiet life in the Common Pleas was realised and he continued to repose upon the "cushion" there without any thing to disturb him till the terrible ministerial crisis in the beginning of the year 1770. Lord Catham having then unexpectedly reappeared upon the stage, Lord Camden's dismissal was only deferred till some lawyer of decent character could be prevailed upon to consent to be his successor.

The first attempt was made upon Wilmot; and, as he happened to be in attendance in the House of Lords, the Duke of Grafton, little dreading a rebuff came up to him, and pointing to the great seal, said, "There it is, Sir Eardly; you shall have it in your possession to-morrow." Sir Eardly shook his head and begged to be excused. The consequence was, the pressure upon Charles Yorke, to which that unhappy man fatally yielded. Immediately after his sudden death, the offer was repeated to Wilmot, with any peerage, pension, and reversion he might be pleased to name; but he was immovable, and the great seal was given in commission to Sir Sidney Stafford Symthe, Sir Richard Aston, and the Honorable Henry Bathurst, afterwards Lord Apsley.

In the beginning of the following year, Lord North having become Prime Minister, before committing the *clavis regni* to the incompetent hands of Bathurst, made another vigorous effort upon Wilmot, but found him still preferring quiet to the first place in his profession, to great wealth, to hereditary honors for his family, and to the opportunity of making an historical name for himself. Bathurst was, in consequence, appointed; and the sarcasm was elicited, that "what the three Lords Commissioners had been unable to do, was now to be done by the most incompetent of the three."

To avoid all further solicitation, Wilmot resolved to resign his office, making infirm health as the ground for his retirement. He [DEC. 29.] had fretted himself into a temporary indisposition, during which he had got other judges to sit for him. Thus he addressed Lord Hardwicke:—

"My health necessitates my retreat from public business; and all that I ask of his Majesty is, that he will be graciously pleased to accept my resignation; for I have observed that it may be communicated to the King in the most humble manner from me that I do not wish or mean to be an incumbrance to his Majesty by any provision out of his civil list. I would much rather resign without any remuneration at all. I hate and detest pensions, and living on the public like an alms-man."

By the special intervention of the King himself a retired allowance was settled upon him; and in January, 1776, his resignation was accepted.

He survived above twenty years. That he might do something for the public money which he received, he long continued to hear appeals in the Privy Council; but himself to the duties and enjoyments of private life. His principal the infirmities of age pressing upon him, he afterwards entirely devoted



occupation in retirement was superintending the education of his younger children. Thus he wrote to a boy of fifteen :—

“Second my endeavors to cultivate your mind and to impregnate it with the principles of honor and truth which constitute a gentleman. These I received in the utmost purity from my own father, and will transmit to you and to your brothers unsullied. However fortune may exalt or depress you, the consciousness of having always acted upon these principles will give you the only perfect happiness that is to be found in this world. But, above all things, remember your duty to God, for without his blessing my love and affection for you will be as ineffectual to promote your happiness here as hereafter; and whether my heart be full of joy or of grief, it will always beat uniformly with unremitting wishes that all my children may be more distinguished for their goodness than their greatness.”

He lived to see the sixth age shift

“Into the lean and slipper’d pantaloon,”

of which he gives the following description, almost as melancholy as that of our immortal dramatist;—“I thought you would be glad to see, under my own hand, that I *exist* both in body and mind; but I can neither go, nor stand, nor eat, nor sleep.” His family and his friends had even to witness the sad spectacle of his passing through the

. . . . “Last scene of all,  
That ends this strange eventful history,  
. . . second childishness and mere oblivion.”

From this he was released on the 5th of February, 1792, when he had reached his eighty-second year. His remains were interred in the parish church of Berkswell in Warwickshire, where a monument has been erected to his memory, which, according to his own directions only gives the dates of his birth, of his death, and of the memorable events of his life.

The impartial biographer must say that although Sir Eardly Wilmot never shone as an orator, a statesman, or an author, he is to be placed in a very high rank in the order of Judges. Beyond the common qualities of patience and purity, he had an extraordinary store of juridical knowledge, he saw with celerity the questions of law upon which the decision of each case depended, and he disposed of these not only with perfect accuracy but with wonderful copiousness of illustration. He was not fortunate in his reporters, Burrow and Wilson; but his son has published, from his own MSS., several of his judgments, which are very honorable to his memory. I can only give a few short specimens of his manner.

An action upon the case was brought for maliciously writing and publishing a libel upon the plaintiff in the following words, imputing to him that he was infected with a loathsome disease :—

“Old Villiers, so strong of brimstone you smell,  
As if not long since you had got out of hell.”

After a verdict for the plaintiff, a motion was made in arrest of judg-

ment by Serjeant Burland, who argued that the words were not actionable; that the itch is a distemper to which every family is liable; that to have it is no crime; nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection;—that the small pox and a putrid fever are worse disorders, yet no action would lie for saying that a person was ill of either of them.

*Wilmot, C. J.*: “I think this is a libel for which an action well lies. If any one maliciously publishes anything in writing concerning another which renders him ridiculous or tends to hinder mankind from associating with him, he is injured, and may have a recompense in damages. I see no difference between this case and saying that a man has the leprosy or the plague, for which it is admitted that an action lies. A writ may issue to the sheriff to remove him without delay *ad locum solitarium ad habitandum ibidem, prout moris est, ne per communem conversationem suam hominibus dampnum vel periculum eveniet quovismodo*. Nobody will eat, drink, or have any intercourse with a person who has the itch and stinks of brimstone. Therefore I think this libel actionable, and that judgment must be for the plaintiff.”<sup>1</sup>

In an action on a policy of insurance on a malthouse burnt down by rioters, who, trying to reduce the price of provisions, for some time had possession of the town in which the insured building stood;—a question arose whether the insurance-office was exempted from liability by an exception in the policy of all fires which might happen by “any invasion, foreign enemy, or any military or *usurped power whatsoever*.”

*Wilmot, C. J.*: “I am of opinion that the firing of the malthouse by the mob is not a fire by any usurped power within the meaning of the exception. Policies of insurance, like other deeds and instruments which evidence the agreements of men with one another, must be construed according to the true intent and meaning of the parties who make them. To find out this intention is often very difficult; for when agreements are committed to writing, all extrinsic evidence of intention is shut out; and words being the only marks of that intention, it happens that sometimes from the imperfection and poverty of language, and sometimes from the barbarous and inaccurate application of it, much doubt arises with respect to the ideas which the parties denote by the words they employ to express them. ‘Usurped power’ are two equivocal words which perplex this question, and, under such a difficulty, judges have no other clue to lead them out of the maze but to consider the import of the accompanying words, to take into consideration the general scope and design as well as the particular sentence in which the words occur. Above all things the popular and ordinary use of the words must be attended to. Usage is the master key which unlocks the meaning of words:—

“‘Quem penes arbitrium est et jus et norma loquendi.’”

Having explained very copiously the nature of the fires by invasion, foreign enemies, and military operations, for which the insurers were

<sup>1</sup> 2 Wilson, 463; *Villiers v. Mousley*.

not to be answerable he thus proceeds:—"In my opinion there is a prodigious difference between mobs and armies. The laws executed with spirit will always suppress a mob: the magistrates did with ease in this case. The undaunted courage of an individual, or the personal appearance of a man of credit and reputation, disperses or assuages these fevers of the people. Our own experience, as well as history, shows it according to that beautiful simile of Virgil;—

“Ac, veluti magno in populo quum sæpe coorta est  
Seditio, sævitque animis ignobile vulgus;  
Jamque faces et saxa volant; furor arma ministrat:  
Tum, pietate gravem et meritis si forte virum quem  
Conspexêre, silent, arrectisque auribus adstant:  
Ille regit dictis animos, et pectora mulcet.”

Suppose a mob fire a house before they disperse, all hands are instantly employed to extinguish it; but neither the courage nor character of individuals can silence the thunder of cannon or prevent the bursting of bombs. To indemnify against the effect of rebellion and civil war may be too perilous an undertaking; but there seems no reason why an indemnity should not be promised against fires raised by a mob. These, though they may be the ruin of individuals, are not likely to occasion a loss beyond the means of a wealthy insurance company.”

One Puisne was of a contrary opinion—but the two others agreeing with the Chief Justice, there was judgment for the plaintiff, and the rule here laid down has been acted upon ever since.<sup>1</sup>

Sitting in the Exchequer Chamber, the question came before him whether a lady could maintain an action against a gentleman upon a deed by which he covenanted that he would not marry any other but her, under a penalty of 1000*l*.

*Wilmot, C. J.*: “Upon the first view of the question the maxim cited at the bar, *volenti non fit injuria*, seems to favor such a covenant; every man has a right *disponere de suo jure*; and as the law does not oblige anybody to marry, and leaves a free agency in that respect to every member of the community, it is not an agreement to omit what the law commands, but an agreement to omit what the law leaves to every man’s choice to omit if he pleases. Besides obligations which are the subject of an action, every member of civil society is under a variety of moral obligations which municipal laws do not enforce; but which the law of nature, the law of God, calls upon him to perform. Gratitude, charity, and all parental and filial duties beyond mere maintenance; friendship, beneficence in all its various branches, and many more which might be named, are duties of perpetual, though imperfect, obligation; and I cannot name a greater than matrimony, being one of the first commands given by God to mankind after the creation, repeated again after the deluge, and ever since echoed by the voice of nature to all mankind. For the precept of multiplication has been always expounded by the civilised part of the world to mean multiplication by the medium of matrimony; and there cannot be a duty of greater importance to society,

<sup>1</sup> *Drinkwater v. Royal Exchange*, Wilm. Op. 282.

because it not only strengthens, preserves, and perpetuates it, but the peace, order, and decency of society depend upon protecting and encouraging it. The point therefore to be considered is, whether a covenant to omit such a duty ought to be enforced *in foro civili*? The writers upon the law of nature consider contracts to omit such duties as void; nay, they consider an oath to perform them as obligatory.<sup>1</sup> Will the law of this country, the perfection of human reason, enforce such a contract? Is a covenant to omit moral duties, which for the exercise of our virtues, are left to our free choice, the proper subject-matter of an action? To entertain an action for the breach of such contracts, would be setting the laws of God and man at variance with one another. The celibacy of ecclesiastics, whether secular or religious, was a weed of the common law, erroneously tolerated by the common law and totally extirpated at the Reformation. The case of the fellows of colleges depends upon the will of the founder: there is a succession in colleges: it is only a temporary restraint on a few in seminaries of learning, which are not proper places for the reception of wives and children." After examining a vast number, he concluded by announcing the unanimous opinion of the Court that *the deed was void*.<sup>2</sup>

As the organ of the Common Law Judges, Wilmot declared their opinion in the House of Lords in the famous case of John Wilkes, on the question whether, the office of Attorney General being vacant, the Solicitor General may file an *ex officio* information for a libel?

"By our constitution," said he, "the King is intrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community for the resenting and punishing of all offences which affect the community; and for that reason all proceedings *ad vindictam et pœnam* are called in the law 'the pleas or suits of the Crown.' In capital crimes these suits of the Crown must be founded upon the accusation of a grand jury; but in all inferior crimes an information by the King is equivalent to the accusation of a grand jury. He employs an officer to file the information in his name; but the accusation is the act of the King, the great constitutional guardian of the public peace. The arguing that the Attorney General only and no other officer, was intrusted by the constitution to sue for the King either civilly or criminally, is a fundamental mistake. The Attorney General is intrusted by the King and not by the constitution; it is the King who is intrusted by the constitution." He then gives an antiquarian history of the office of Attorney General, showing how by the will of the sovereign it had gradually acquired its present dignity, and then proves that the Solicitor General has co-ordinate authority: "The Solicitor General is the *Secundarius Attornatus*; and as the courts take notice judicially of the Attorney General when there is one, they take

<sup>1</sup> Grotius, lib. ii. cap. 13, s. 67.

<sup>2</sup> *Low v. Peers*, Wilm. Op. 364. *Tamen quære*, for the covenant was substantially a mere promise to marry the plaintiff or pay her a sum of money, and therefore not in restraint of marriage; and the instrument being under seal, there was no necessity for a reciprocal obligation, or any other consideration, being expressed on the face of it.



notice of the Solicitor General as standing in his place when there is none. He is a known and sworn officer of the Crown as much as the Attorney; and, in the vacancy of that office, does every act and executes every branch of it. When the Attorney dies or is removed, must the great criminal jurisdiction of this kingdom, in his department, be suspended till another is appointed? Where is it to be found that in this interval the noblest branch of the King's regal office becomes inactive, and the subject's right to protection is in abeyance?" He then cites many precedents in support of this opinion,—upon which the judgment against Wilkes was affirmed.<sup>1</sup>

I shall, further, only give a short extract from a judgment which he had written, but which was not delivered, in a case in which there was a summary application to the Court of King's Bench for an attachment against a bookseller who had published a pamphlet reflecting severely on Lord Mansfield and the other Judges of the court for their conduct in libel prosecutions instituted by the Crown. The doctrine he lays down, that, by the law of the land, courts may punish in a summary manner for *contempt*, instead of waiting for an indictment to be tried by a jury, is highly important, as it applies equally to the privilege of the two Houses of Parliament to follow a similar course:—

"The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law: it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be found about it; it cannot, therefore, be said to invade the common law; it acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury; it is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other."<sup>2</sup>

Sir Eardly Wilmot seems to have been venerated in his own time.—He is spoken of with harshness only by Horace Walpole, who, prejudiced

<sup>1</sup> *Wilkes v. The King*, Wilm. Op. 322.

<sup>2</sup> *Rex v. Almond*, Wilm. Op. 243. In consequence of the resignation of Sir Fletcher Norton, who, as Attorney General, had made the motion, it was dropped, after cause shown, while the Court was considering of its judgment; and although there can be no doubt as to the power to proceed by attachment in such a case,—if a prosecution for a libel on judges be necessary, the preferable course is to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties.

against him (as is supposed) by party malignity, after observing that "he was much attached to Legge," adds, "He loved hunting and wine, and not his profession." But, as Wilmot was certainly dull, though of a solid understanding, the noble and fashionable memoir-writer could never have been in his company, and could have known very little about him, for he describes him as "a man of great vivacity of parts." He rarely indulged in wine, and "*case-hunting*" was the only sport in which he took delight.<sup>1</sup>

The following character of him is drawn by his son, which, though colored by pious partiality, presents a striking likeness:—

"His person was of the middle size; his countenance of a commanding and dignified aspect; his eye particularly lively and animated, tempered with great sweetness and benignity. His knowledge was extensive and profound, and, perhaps, nothing but his natural modesty prevented him from equalling the greatest of his predecessors. It was this invincible modesty which continually acted as a fetter upon his abilities and learning, and prevented their full exertion in the service of the public. Whenever any occasion arose that made it necessary for him to come forward (as was sometimes the case in the House of Lords, in the Court of Chancery, and in the Common Pleas), it was always with reluctance; to perform a duty, not to court applause, which had no charms for his pure and enlightened mind. But although he was never fond of the practice of the law as a profession, he often declared his partiality for the study of it as a science: as an instance of this, after he had resigned his office he always bought and read the latest Reports, and sometimes borrowed MS. notes from young barristers. He was not only accomplished in the laws of his own country, but was well versed in the civil law, which he studied when at Trinity Hall, Cambridge, and frequently affirmed that he had derived great advantage from it in the course of his profession. He considered an acquaintance with the principles of the civil law as the best introduction to the knowledge of law in general, as well as a leading feature in the laws of most nations of Europe. His knowledge, however, was by no means confined to his profession. He was a general scholar, but particularly conversant with those branches which had a near connexion with his legal pursuits, such as history and antiquities. He was one of the original fellows of the Society of Antiquaries, when first incorporated in 1750, and frequently attended their meetings, both before and after his retirement: most of his leisure hours were spent in the above researches. But of all the parts of Sir Eardly's character, none was more conspicuous than the manner in which he conducted himself on the bench in that most delicate and important office of hearing causes, either of a criminal or civil nature. He was not only practically skilled in his profession, but his penetration was quick and not to be eluded; his attention constant and unabated; his elocution clear and harmonious; but, above all, his temper, moderation, patience, and impartiality were so distinguished, that the parties, solicitors, counsel, and audience went away informed and satisfied, if not contented,—*etiam*

<sup>1</sup> Mem. Geo. II., ii. 107.

contra quos statuit, æquos placatosque dimisit.' This was the case in questions of private property; but when any points of a public nature arose, there his superior abilities and public virtue were eminently characterized: equally free from courting ministerial favors or popular applause, he held the scale perfectly even between the Crown and the people, and thus became equally a favorite with both. This was conspicuous on many occasions, but particularly in the important cause, related before, between Mr. Wilkes and Lord Halifax, in 1769. In private life he likewise excelled in all those qualities that render a man respected and beloved. May the remembrance and contemplation of his virtues inspire his descendants with a desire to imitate them! This he would have thought the most grateful reward, this the noblest monument! Such unaffected piety, such unblemished integrity, such cheerfulness of manners and sprightliness of wit, such disinterestedness of conduct and perfect freedom from party spirit, could not and did not fail of making him beloved, as well as admired, by all who knew him. Genuine and uniform humility was one of his most characteristic virtues. With superior talents from nature, improved by unremitting industry, and extensive learning, both in and out of his profession, he possessed such native humbleness of mind and simplicity of manners that no rank nor station ever made him think highly of himself or meanly of others. In short, when we contemplate his various excellencies, we find ourselves at a loss whether most to admire his deep and extensive learning and penetration as a lawyer; his industry, probity, firmness, wisdom, and patience as a judge; his taste and elegant accomplishments as a scholar; his urbanity and refined sentiments as a gentleman; or his piety and humility as a Christian."

We must place him far above those who have been tempted by inordinate ambition, to mean or wicked actions; yet we cannot consider his public character as by any means approaching to perfection, for he was much more solicitous for his own ease than for the public good. By becoming a representative of the people, he might have materially assisted the House of Commons in its legislative deliberations. By accepting the great seal, he would have rescued the country from the incompetence of Bathurst, who, hardly qualified to be a chairman of Quarter Sessions, presided seven years on the woolsack. Filling the marble chair, what benefits might he not have conferred upon the community by his decisions, and by the amendment of our laws! He was deterred, not by any misgivings as to his own qualifications, or by any dislike to the political principles of those with whom he was to be associated in the cabinet, but by morbid hatred of conspicuous position, and by selfish love of tranquillity. He did not shun political strife that he might make discoveries in science or contribute to the literary fame of his country. The tendency of the tastes by which he was animated is to make life not only inglorious, but useless.<sup>1</sup>

<sup>1</sup> The facts of this little memoir are almost all taken from a *Life of Sir John Eardly Wilmot*, published by his son in the year 1811. A few are added from the traditions of Westminster Hall.

I now come to a man who, animated by a noble ambition for power and fame, willingly acted a conspicuous part before the public for above half a century; who was a great benefactor, as well as ornament, to his own times; and whose services to a distant posterity will be rewarded by his name being held in honored remembrance.

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## CHAPTER XXX.

### LIFE OF LORD MANSFIELD FROM HIS BIRTH TILL HE WAS CALLED TO THE BAR.

AN indifferent author, who wished to write the life of Lord Mansfield, having applied to him to be furnished with materials, "so that the brilliancy of such a splendid luminary of the law might never fade," received the following answer:—"My success in life is not very remarkable: my father was a man of rank and fashion; early in life I was introduced into the best company and my circumstances enabled me to support the character of a man of fortune. To these advantages I chiefly owe *my* success; and therefore my life cannot be very interesting; but, if you wish to employ your abilities in writing the life of a truly great and wonderful man in our profession, take the life of Lord Hardwicke for your subject; he was indeed a wonderful character; he became Chief Justice of England, and Chancellor, from his own abilities and virtues, for he was the son of a peasant."

Unless this may be excused as a mode of getting rid of an impertinent application from a coxcomb, it must be considered an ebullition of aristocratic insolence. The "*peasant*" was an eminent attorney in England; and, by birth, *his* son had an infinitely better chance of succeeding at the English bar, and reaching the highest dignities in Westminster Hall than the son of a poor Scotch peer, of descent however illustrious. When the babe, afterwards Earl of Mansfield and Chief Justice of England, first saw the light at Scone, the chances were many millions to one that he would never fill that office; and the probability was, that, if he was not cut off by some of the diseases of childhood, he would obscurely waste his days, like a true younger brother—with a contempt of trade and of books,—angling for salmon in the river Tay, and coursing the deer over the braes of Athol; or that he would languish as a subaltern in the army, without hope of promotion, in the service of King George; or (which was still more probable) that he would wander over Europe in exile and in indigence, as an adherent of King James, enjoying no prospect of celebrity except that which might accrue to him from being beheaded on Tower Hill.

His circumstances did *not* enable him "to support the character of a man of fortune," and he did *not* owe his success to the advantages which



he then enumerated. His life, therefore, is very interesting,—and it must be curious to trace the steps by which, after riding on a wretched pony from Perth to London, “he drank champagne with the wits;” he became the most distinguished advocate in England: he prosecuted Scotch peers, his cousins, for treason against King George; he was the rival of the elder Pitt, the greatest parliamentary orator England has ever produced; he was raised to be the highest criminal Judge of the realm; he repeatedly refused the still more splendid office of Lord Chancellor; he, without political office, directed the measures of successive Cabinets; and (what was far truer glory) he framed the commercial code of his country.

There are other considerations which particularly excite me as I enter upon the life of LORD MANSFIELD. He was the first Scotchman who ever gained distinction in the profession of the law in England; and, though his education was English, the characteristics of his race may have contributed to his success.<sup>1</sup> Being, like him, an English lawyer, I am proud of him when I reflect that he affords a rare example among us of a genuine taste for elegant literature, combined with a profound knowledge of jurisprudence. But, most of all, I look upon him with interest as a connecting link between the reign of Queen Anne and our own times. Having been the familiar friend of Pope, he was the familiar friend of my familiar friends.<sup>2</sup> Occupying the stage of political life almost for a century, he brings together systems as well as men that seem many generations asunder. After the expulsion of the Stuarts he saw the present dynasty placed upon the throne of Britain; and he lived to hear the news of the murder of Louis XVI., and to foresee and foretell all the evils which Europe has since suffered, and is suffering, from a violation of the principles of order and of true liberty.

In following the career of such a man, while we meet with striking vicissitudes affecting him individually, we must catch interesting glimpses of history and of manners. But I have too much raised expectation, and I must now expose myself to the peril of disappointing it.

Lord Mansfield was entitled to the consideration which fairly belongs to distinguished ancestry. Setting aside the fabulous origin of his family from a great MORAVIAN chief, supposed in a very remote age to have conquered a province of Scotland now called *Morayshire*, we know

<sup>1</sup> Different trades and professions seem to suit the inhabitants of different countries. In London, all the milkmen are Welsh; all the sugar-bakers are German, and a great many of the tailors. The vast majority of the bakers are Scotch, but there is not a Scotch butcher to be found. While no tolerable theatrical performer ever came from Scotland, we have had considerable success in medicine and in law. To the literature of the country I trust it will be allowed that there are less than 3,000,000 of inhabitants in Scotland, while there are 8,000,000 in Ireland, and 14,000,000 in England.

<sup>2</sup> I may particularly instance the late Mr. Justice Allan Park and Lord Mansfield's kinsman the present Lord Murray, a judge of the Court of Session. My greatest boast in this line is, that I have conversed with Sir Isaac Herd, the celebrated HERALD, and he had conversed with a person who was present at the execution of Charles I.

from authentic records, that *Friskinus de Moraviâ* was a powerful noble in the north of Scotland in the beginning of the twelfth century; and that *Gulielmus de Moravia*, his lineal descendant, by a charter of King Alexander III., dated 1284, was confirmed in the possession of the estates of Tullebardine, in the county of Perth, which he had obtained by marriage with the heiress of Malise, Seneschal of Strathearn. From him sprang a long line of Barons of Tullebardine, represented by the present Duke of Athol, chieftain of the Murrays.

A younger son of Sir William Murray, the eighth Baron of Tullebardine, was married to the Lady Janet Graham, daughter of the Earl of Montrose, and had several sons, who, though highly connected, were very poorly provided for, and seemed to have no resource for a subsistence but to join an occasional *raid* on the lowlands, or to become tacksmen to the chief of the clan of a patch of land in a remote highland glen. This was probably the fate of all of them except one, for no mention is afterwards made of the others; and their descendants may be shoemakers at Perth, or may be sweeping the crossings of the streets in London unconscious of any claim to noble ancestry. But David, the second son, became the founder of the Stormont branch of the family, and is the ancestor of the Earls of Mansfield.

Being remarkably well formed and athletic, he was enlisted, when very young, as a private in a small body of halberdiers, all of gentle blood, constituting the body-guard of James VI., who nominally had filled the Scottish throne from his infancy, while his mother, Mary, the rightful sovereign, was a captive in a foreign land, and successive factions governed in his name. The identical passion for handsome favorites, which afterwards raised the Earl of Somerset and the Duke of Buckingham to such unfortunate distinction in England, showed itself in the Scottish monarch in early youth. Caught by the good looks, pleasing manners, and skill in all sorts of games which he discovered in David Murray, he made him his companion, knighted him, and promoted him to be Master of the Horse, Comptroller of the Household, and Captain of the Body-guard.

It so happened that the favorite was in attendance on his royal patron [A. D. 1600.] in the castle of the Earl of Gowrie, at Perth, when that *conspirator* (for such, after long controversy, I fear he is now proved to have been) attempted to make the King a prisoner, with the view of getting all the power of the state into his own hands.<sup>1</sup> Sir David Murray displayed great presence of mind upon the occasion, and gave important assistance in rescuing the King and securing the traitors. He soon afterwards gallantly quelled an insurrection of the inhabitants of Perth and the surrounding country, who idolised the young Earl of

<sup>1</sup> I wish I could have defended him from this charge as he was the heir and representative of the Lords Hallyburton, from whom I am descended; but, in spite of the many volumes which have been written on the Gowrie Conspiracy to prove that JAMES got up a sham plot to wreak his vengeance on a family he had devoted to destruction, I think there can no longer be a doubt that the plot was real, and that he had very nearly been the victim of it.

Gowrie and had risen to avenge his death. For these services a considerable portion of the forfeited estates of that nobleman was bestowed upon him. The site of the ancient Abbey of Scone,—where the kings of Scotland had been crowned from the remotest antiquity, and where stood, till it was removed to Westminster by Edward I., the famous stone on which they were anointed,—had been granted to the Earl, after the sacred edifice itself had been burned to the ground by the reformers ;—and here he was erecting a new castle, or PALACE (as it was called from royal recollections), at the time of his attainder. This became part of the possessions of the new favorite, who completed the structure, and was designated Lord Scone, the property having been erected into a temporal barony. He continued in high favor at court till James's accession to the throne of England ; and, although he was then cast off for other minions, he was afterwards, by letters patent bearing date 16th of August, 1621, created Viscount Stormont.<sup>1</sup> This title, long borne by his descendants in the lineal male line, was absorbed by the earldom, which a *cadet* won by very different arts and achievements.

For several generations following, the family were distinguished by extravagance rather than by talent or enterprise, and a large portion of the possessions which they had received from the bounty of King James VI. had been alienated. In the time of the fifth Viscount little remained to them beyond the Castle of Scone, which, in a dilapidated condition, frowned over the Tay in the midst of scenery which for the combination of richness and picturesque beauty is unsurpassed. He had married the only daughter of David Scot, of Scotstarvet, the heir male of the Scots of Buccleugh ; but had received a very slender portion with her, as their vast possessions had gone with the daughter of the last Earl, married to the Duke of Monmouth. To add to the difficulties of the poverty-stricken Viscount, his wife, although of small fortune, was of wonderful fecundity, and she brought him no fewer than fourteen children. For these high-born imps oatmeal porridge was the principal food which [A. D. 1705.] he could provide, except during the season for catching salmon, of which a fishery near his house, belonging to his estate, brought them a plentiful supply.

William, the eleventh child and fourth son of this brood, destined to be Chief Justice of England, was born in the ruinous castle of Scone, on the 2d day of March. 1705.<sup>2</sup> I do not read that his mother had any prophetic dream while she carried him in her bosom, or that any witch or wizard with second sight foretold his coming greatness. He muled and puked like other children, and when it was time that he should be taught his letters he was sent to a school at Perth, only a mile and a half from his father's residence, where he ran about with the sons of the surrounding gentry and of the citizens and tradesmen of the town, all barefooted, and speaking a dialect which was not *Gaelic*, for Perth was always within

<sup>1</sup> There may still be seen in the adjoining church a fine marble monument over his tomb, representing him, as large as life, in a kneeling posture, and in complete armor.

<sup>2</sup> The date is usually given 1704, but this is according to the old style.



the boundary which separated the Lowlands of Scotland from the Highlands, but which was a *patois* hardly to be called Anglo-Saxon.<sup>1</sup>

Holliday,—who, although he had every advantage in writing the life of Lord Mansfield, being himself a lawyer in extensive business, having often practised before him, and having been honored with his friendship, has left us the worst specimen of biography to be found in any language,—says, “About the tender age of three years he was removed to, and educated in, London; and, consequently, he had not, when an infant, imbibed any peculiarity of dialect.” This statement has been followed by all the subsequent biographers of Lord Mansfield, and has been assumed for truth by all who have since referred to his early career. According to Boswell, “Dr. Johnson would not allow Scotland to derive any credit from Lord Mansfield, as he had been reared in England; observing, ‘Much may be made of a Scotchman if he be *caught* young.’”

[A. D. 1710–1713.] But I have ascertained from his near kinsmen, who speak from family papers, that the story of his being thus *caught* and *tamed* is pure invention. He remained at the grammar school at Perth till he was in his fourteenth year,—when he went to Westminster. Afterwards, by constant pains with his pronunciation, and by never returning to visit his native country, he did almost entirely get rid of his Scottish accent; but there were some *shibboleth* words which he could never pronounce properly to his dying day, and which showed that his organs of speech had contracted some rigidity, or his organs of hearing some dullness before his expatriation. For example, he converted *regiment* into *reg'ment*; at dinner he asked not for *bread* but for *brid*; and in calling over the bar, he did not say “Mr. *Solicitor*,” but Mr. “*Soleestor*, will you move any thing?”

I need hardly notice the equally unfounded story that he was at Lichfield School along with Lord Chancellor Northington, Chief Justice Willes, Chief Justice Wilmot, Chief Baron Parker, Sir Thomas Clarke, Master of the Rolls, and a herd of puisne judges, who are supposed to have played there together at taw, and afterwards simultaneously and exclusively to have presided in Westminster Hall. Instead of such amusing wonders, I am obliged to state that he spent his boyhood among companions whom he never afterwards met, or much wished to meet again. However, Latin was infinitely better taught then in the grammar schools of Scotland than at the present day; and young Willie Murray, could not only translate Sallust and Horace with ease, but had learned a great part of them by heart,—could converse fluently in Latin,—could write Latin prose correctly and idiomatically,—and even could have contributed Latin verses to the *DELICIÆ POETARUM SCOTORUM*, a collection of modern Latin poems which had been published not long before in Edinburgh, and which must be allowed to be much superior to

<sup>1</sup> A very circumstantial account of his infancy was given by his nurse, who died in 1790, in the parish of Monimail, in Fife, at the age of 105. She usually concluded her narrative by observing that “Mister Willie was a very fine laddie.” See Sir John Sinclair’s Statistical Account of Scotland, ii. 404.



the MUSÆ ETONENSES or the ARUNDINES CAMI.<sup>1</sup> In Greek he made little progress beyond learning the characters and the declensions.<sup>2</sup>

But there was another foreign language which he was taught grammatically, and which he was supposed to speak and write with wonderful facility and accuracy. Pure English was laboriously attended to at Perth School, both in reading and composition; its rules and its irregularities were fully explained, and the writing of an English essay was an exercise required from the boys at the peril of the *ferula*. Lord Mansfield, in his old age, was often heard to declare that when at Westminster and at Oxford, and even when contending with rivals in public life he had enjoyed an essential advantage from this discipline, as he discovered that in England, while they wasted many years on Latin and Greek prosody, they almost entirely neglected the scientific cultivation of their mother tongue; and he found eminent lawyers and statesmen who, when forced to commit their thoughts to writing, showed that they had no notion of the division of English prose into sentences, and who, though decently well acquainted with orthography, set at utter defiance the rules of grammar.

Willie Murray, according to the tradition in his family, while going through the school at Perth, displayed the sharpness of intellect, the power of application, and the regularity of conduct which distinguished him in his after-career. He was almost always *Dux*, or head of his class; and, albeit that, according to the custom of the age, flagellation, with the *taws* was administered even for small faults, his hand remained without a blister.<sup>2</sup>

Till the year 1713, Lord and Lady Stormont continuing to reside in the palace at Scone, Willie lived at home with them, and he daily walked or rode on a pony to school,—thus combining, in the Scottish fashion, the advantages of public education and of domestic discipline. But, for the sake of economy, the family was then moved to a small house at Camlongan, in the county of Dumfries; and Willie and a younger brother, Charles, were boarded with Mr. Martine, the master of the grammar-school at Perth, who received for them a yearly payment in

<sup>1</sup> I have often been at a loss to understand how Latin versification, which had flourished in Scotland so much in the 16th and 17th centuries, disappeared so completely in the 18th. When I was a boy, although the habit of composing Latin prose was well kept up, I do not believe that in all Scotland there was either a schoolboy or a schoolmaster who, to save his life, could have written in Latin an alcaic ode, or twenty hexameters and pentameters alternately. The practice of speaking Latin still prevailed. There has since been an attempt at a *revival*, and Latin versification is practised at the High School of Edinburgh and other classical seminaries,—but if we may judge from the “Musæ Edinenses,” not as yet with very great success.

<sup>2</sup> I am sorry to say that Greek has at no time been cultivated in Scotland as this noble dialect deserves, although it has been much more attended to of late years, since professors bred at Oxford and Cambridge have been elected to the Greek chairs in the Scotch Universities.

<sup>3</sup> Instead of the *birch* applied to another part of the person, in English fashion, the Scots have adopted the punishment which made good scholars at Rome,—  
“Et nos ergo ferulæ subduximus.”

money and a certain allowance of oatmeal. The following items respecting them, which I have extracted from the accounts of Mr. Barclay, a writer to the signet, Lord Stormont's Edinburgh agent, may amuse the reader:—

		£	s.	d.
1715.	May 25. Item.—Sent to Scone per Lady's letter for <i>Mr. William</i> , CÆSARIS COMMENTARIUS -	1	04	00 <sup>1</sup>
1717.	Aug. 8. Item.—At order bought of <i>Mr. Freebairn</i> for <i>Mr. William</i> , my Lord's son TITUS LIVIUS, in a great folio and large print for 20s. Sterlin, sent to Perth by <i>Walker</i> the carrier - - - - -	6	00	00
—	June 24. Item.—Paid to <i>Mr. John Martine</i> for <i>Mr. Wil-</i> <i>liam</i> and <i>Charles</i> , their quarter payment and for their board from the 17th June to 17th Sept. p <sup>r</sup> receipt - - - - -	60	00	00
—	July 13. It.—Payd to <i>Charles Melvill</i> , merch <sup>t</sup> in Perth, a year's chamber meal for <i>Mr. William</i> and <i>Mr. Charles</i> as p <sup>r</sup> discharge to Whyts. 1717	18	00	00
—	Aug. 16. It.—For cutting <i>Mr. William</i> and <i>Charles</i> hair - - - - -	0	12	00
—	Sept. 24. It.—To a Perth carrier for bringing over books from Ed <sup>r</sup> to <i>Mr. William</i> - - -	00	06	0
	It.—Given out by the Compter for <i>Mr. Wil-</i> <i>liam</i> and <i>Charles</i> , as p <sup>r</sup> particular accompt	35	19	00
	It.—For a pair of boots for <i>Mr. William</i> -	03	12	00
—	Nov. 14. Letters from <i>Mr. William Murray</i> , my Lord's son, with one enclosed to his sister <i>Amelie</i>	00	02	00
—	Nov. 19. A letter from <i>Mr. William</i> with one inclosed to my Lady from St. Andrews - - -	00	02	00

When Mr. Solicitor General Murray was afterwards rising into greatness, envious libels upon him sarcastically referred to his early education, and the following graphic account was given of his schooling at Perth,—

“Learning was very cheap in his country, as it might be had for a groat or a quarter, so that a lad went two or three miles of a morning to fetch it; and it is very common to see there a boy of *quality* lug along his books to school, and a scrip of oatmeal for his dinner, with a pair of brogues on his feet, posteriors exposed, and nothing on his legs.”<sup>1</sup>

Willie Murray approaching his fourteenth year, the time was at hand when, according to the system of education then and still subsisting in

<sup>1</sup> On examining this account I was much surprised at the seeming enormously high price of books in Scotland in the beginning of the last century, till I discovered that it is kept in Scottish currency—by which the pound, which was once the same all over Europe, being a pound of silver according to the standard of Troyes, and was reduced in England to one-third of its original value,—in France to 10*d.*,—was reduced in Scotland to 1*s.* 8*d.*, of English currency;—so that the price of CÆSAR'S COMMENTARIES, instead of being 1*l.* 4*s.*, was only 2*s.* Of course all the other items are to be lowered in proportion.

<sup>2</sup> Pamphlet entitled “BROADBOTTOM.”

Scotland, he was supposed to have learned all that could be acquired at school, and it was in contemplation to send him to the neighboring University of St. Andrew's, where some remains of the passion for classical learning, kindled by George Buchanan when Principal of St. Leonard's College, still lingered.<sup>1</sup>

Much perplexity existed in the family with respect to the choice of a profession for him. His father, although he had not joined the Earl of Mar or fought at Killiecrankie, was a decided Jacobite, and his brother James had followed the Stuarts into exile. There was, therefore, little hope of promotion for any of the family from Court favor as long as the House of Hanover should keep possession of the throne. The Church offered no resource; for the Nonjuring Episcopalians were not even tolerated, and few of the Presbyterian livings reached 100*l.* a year. The law was more hopeful; but, from its being the only civil profession in Scotland deemed fit for a gentleman, the numbers who followed it bore a fearful proportion to its emoluments.

Upon this subject Lord Stormont consulted James, his second son, with whom, although now avowedly belonging to the court of the Pretender, and created by the banished sovereign EARL OF DUNBAR, he still indirectly kept up an affectionate intercourse.

This gentleman, who is said to have possessed the same shining abilities and silver-toned voice as William, when he had reached his eightieth year died an outlaw,<sup>1</sup> but during [A. D. 1718.] the early portion of his exile he no doubt expected, like another Clarendon, to see the legitimate heir restored to the throne and to rule Britain in his name. He had been bred to the bar in Scotland, and probably would have gained great forensic eminence had it not been that in the year 1710, before he had made much progress in his profession, he was returned to the House of Commons as representative for the Elgin district of burghs. He thereupon went up to London, and enlisted himself under the banner of Bolingbroke, professedly belonging to the high-Tory and secretly abetting the Jacobite cause. He was thus naturally introduced to Bishop Atterbury, then Dean of Westminster, and by political sympathy he gained the confidence of this daring prelate, who, when others quailed, himself offered in his lawn sleeves to proclaim James III. When at the death of Queen Anne, Bolingbroke's plot to bring in her brother failed, and George I. quietly succeeded as if by hereditary right, James Murray followed the example of his leader, and, much more steady and trustworthy, he always remained true to the Stuarts, notwithstanding their imbecility and their bigotry. He hoped to draw over his brother William, of whose sprightly parts he had heard

<sup>1</sup> Having heard a surmise that he actually studied at St. Andrew's during the session 1717-18, I caused a search to be made through the kindness of my friend Sir David Brewster, Principal of the United College of St. Saviour's and St. Leonard's there—but the only matriculation of any of the family to be found is that of his brother Charles: Cha: Murray fil: Vicecomitis de Stormont, matriculated in Coll. D. Leonardi. 1721."

<sup>2</sup> He died at Avignon in 1770, and was fifteen years older than Lord Mansfield.

much, to the same side. For this purpose he thought there could be no means so effectual as having him educated under the auspices of Atterbury. He therefore wrote back to his father a flaming account of Westminster School,—mentioned the distinguished men he had become acquainted with who had been reared there,—stated that, with proper management, the expense of starting a boy there was not considerable,—hinted at the interest he still had which might be made available to have Willie put upon the foundation as a King's scholar—pointed out the certainty of his obtaining a scholarship at Christ Church,—and showed how, in that case, every thing would be open to him in the church and in the state.

The plan seemed so feasible, that at a family counsel it was unanimously approved of, and Willie was delighted with the prospect of speedily seeing all the wonders of London instead of pining in the gloomy cloisters of St. Andrew's, or being overpowered by black smoke and bad smells in *Auld Reekie*.

He was to perform the whole journey on horseback,—riding the same horse. Post-horses were not established till long after. There were then two or three times a month traders from Leith to the river Thames, in which passengers might be accommodated; but, if the wind was foul, they were sometimes six weeks on the way. A coach, advertised to run once a week from the Black Bull in the Canongate to the Bull and Mouth in St. Martin's le Grand, did not promise to arrive before the tenth day, and, besides being very incommodious, was very expensive. Mr. William was therefore to be carried on the back of a "Galloway," or pony which my Lord had bred, and which was to be sold on his arrival in the great city to help to pay the expenses of his outfit there.

On the 15th of March, 1718, he joyfully bade adieu to Mr. Martine and his school at Perth, and expected easily to reach Edinburgh the same day; but near the Queen's Ferry the horse fell lame, and it was necessary to leave him behind, the rider travelling the rest of the stage on foot.

Having completed his equipment at a shop in the Luckinbooths, and his horse being again sound and serviceable, on Saturday, March 22d, he left Edinburgh for Camlongan, where he was to take leave of his parents.<sup>1</sup>

We have no information respecting the parting scene; but we need not doubt that it was very tender on both sides. An assertion may be

<sup>1</sup> I find the following entries in Mr. Barclay's accounts connected with these occurrences; but they add very little to the information we have from other sources:—

"1718. March 22. Mr. Wm. my Lord's son, taking jurney here this day for Camlongan—payd by me at the stable to a ferrier for the horse brought in lame here by Cameron on Sunday the 16th under cource till this day 4s. Ster. - - - £2 08 00			
1 <i>l</i> . Att Corsons Lord Invernrie's governour Denbres' 2 sons and governour conveying Mr. Wm. to his horse payed be Sandie Orane for morning drink - - - - -			£3 8

NOTA—Mr. Wm. payed 9s. Ster. for keeping the horses att Robt Corsons himself."



hazarded that much good advice was given, and that warm promises of good conduct were sincerely reiterated. An old ash-tree is still shown in Dumfriesshire under which, according to tradition, Lord Mansfield received his father's blessing. It is a melancholy fact that he never saw either parent more.

But whatever forebodings he may have had, they were soon dispelled when he found himself on the high road leading from Dumfries to Carlisle,—when he felt he was his own master,—when he told over the money with which he was intrusted to pay his expenses on the way,—when he thought of the various counties through which he was to pass, some of which were greater than Perthshire, which he had considered sufficient for an empire,—when he figured to himself the King he was soon to see with a golden crown on his head,—and when his bosom swelled with the proud certainty that he could never more be in danger of the *taws*. As we imagine him to ourselves trotting along and communing with himself, it is impossible not to be struck with the similarity of his situation to that of Gil Blas, when this unlucky youth, having received the blessing of his parents, started on his uncle's mule from Oviedo on the road to Pagnafior, with the intention of studying at the university of Salamanca. But the Scotsman had much less vanity and much more prudence. Therefore he was not mystified by a parasite, he was not cheated of his horse, he did not become a companion of highwaymen, and he safely reached his destination. The only particulars that we know of his journey are, that he slept the first night at Gretna Green, which had not yet acquired its hymeneal reputation, English runaway marriages then and long after being celebrated in the Fleet and Mayfair,—and that he was much struck, the following day, with the fortifications of Carlisle, which appeared formidable to an unmilitary eye, although a few years later the place, after a short siege, surrendered, first to Prince Charles and then to the Duke of Cumberland. He followed the same route which was taken by the rebels as far as Derby, and if they had boldly dashed on, as he still did, they might, like him, have carried all before them in London.

His long, but not wearisome journey was concluded on the 8th of May, 1718. He had been consigned to the care of one *John Wemyss*, an emigrant from Perth, who had settled in London as an apothecary, and had thriven there very much by his skill, attentiveness, and civility. This canny Scot had been born on the Stormont estate, and was most eager to have it in his power to be of service to any of that family. He did all that was necessary to launch *Mr. William* in London, by assisting him to sell his horse, by advancing him money and making payments for him, by buying him a sword, two wigs, and proper clothes, by entering him with the head master of Westminster School, and by settling him at a dame's in Dean's Yard. The following are a few items in the account which he afterwards rendered in to Lady Stormont, and they give a more lively notion of the customs and manners of the time than could be gathered from whole pages of dull narrative, explanation, and dissertation :—

Lib. sh. d.

1718.	May 8.	for y <sup>e</sup> carriage Mr. William's Box and bringing it home	-	-	-	-	-	-	09	.
		for his horse before he was sold	-	-	-	-	-	-	08	7
		To Dr. friend for enterance	-	-	-	-	-	-	1	01
		for a Trunk to him for his cloaths	-	-	-	-	-	-	13	0
		To his Landlady where he Boards, for Entry money	-	-	-	-	-	-	5	05 0
	—25.	for a sword to him	-	-	-	-	-	-	1	01 0
		for a belt	-	-	-	-	-	-	2	.
		for pocket money to him	-	-	-	-	-	-	3	.
	June 5.	for pocket money	-	-	-	-	-	-	1	.
		for two wigs as per receipt	-	-	-	-	-	-	4	4 .
	—18.	for a double letter and pocket money to him	-	-	-	-	-	-	2	.
	Aug. 16.	To Mr. William who went to the Countrey	-	-	-	-	-	-	6	.
	Dec. 17.	Three guineas to the masters and a double letter	-	-	-	-	-	-	3	4 .
1719.	Jany 4.	for pocket money 5 shil: and the ij to Dr. Friend	-	-	-	-	-	-	3	8 .
		3 guineas	-	-	-	-	-	-	3	8 .
	—21.	To Mr. Wm. to Treat with before the Elections began	-	-	-	-	-	-	1	1 .
		Pay'd the taylor as p <sup>r</sup> bill	-	-	-	-	-	-	9	9 .
		Pay'd Mrs. Tollet for $\frac{3}{4}$ years board and for things laid out for him as p <sup>r</sup> bill	-	-	-	-	-	-	20	10 4

William Murray was a good boy, and stuck very steadily to his books.

[A. D. 1719.] His strange dialect at first excited a little mirth among his companions, and they tried to torment him by jokes against his country; but he *showed his blood*, and they were speedily soothed by his agreeable manners, and awed by the solidity of his acquirements.

At the end of a year (as his brother James, Earl of Dunbar, had foretold,) he was elected a King's scholar.<sup>1</sup> Beyond his own merits there must have been some powerful interest required to procure this step, for Westminster School was then crowded, and the foundation was much coveted. I suspect that Bishop Atterbury had said a good word for the scion of a noble Jacobite family,—but of this there is no positive evidence.

Soon after, Mr. Wemyss, the apothecary, wrote the following letter, addressed—

“To

The Right Honble  
The Viscountes of Stormont  
at her house near Dumfries  
By Carlisle Bag.

“Madam,—I humbly beg pardon for my long silence; had there been anything of moment to impart to your La<sup>p</sup> I shou'd not have fail'd to have written. Y<sup>r</sup> La<sup>p</sup> no doubt has heard that y<sup>r</sup> son Mr. William has not only had meritt but good luck to be chosen a queen's schollar, for I can tell y<sup>r</sup> La<sup>p</sup> that there is favor oftner that prevails against meritt, even in this case as well as in other affairs of the world.

<sup>1</sup> 21 May, 1719. (Printed list of King's Scholars.)

Tho' give him his due there can't be a finer youth or one who minds his business more closely. Y<sup>r</sup> La<sup>p</sup> sees that he spends a good deall of money. But he won't spend near so much next year.

"I got 40 guineas, so y<sup>r</sup> La<sup>p</sup> will see that I have laid out twelve pounds two shillings and 7*d.* more than I rec<sup>d</sup>. I beg y<sup>r</sup> La<sup>p</sup> wou'd cause pay it in to Mrs. Janet Cunningham, at her mother's house, Cannongate Cross, Edinburgh—the mother is my aunt, her name Wemyss—for it will be cal'd for pretty soon. I think to remitt some moey next week to Scotland; so if y<sup>r</sup> La<sup>p</sup> pleases I shall lay out what moey you think fitt in paying the other bills, w<sup>ch</sup> will save you the exchang. My cuisne will give you a receipt of the moey when it is pay'd her at Edr, w<sup>ch</sup> shall be sufficient.<sup>1</sup> Y<sup>r</sup> La<sup>p</sup> ffriends abroad are weill.<sup>2</sup> Pardon the trouble of my long l<sup>re</sup>. I had no mind to send the bills in this letter because of its bulk. But I shall next week in a frank.

"I am, Madam,

"Y<sup>r</sup> L<sup>ps</sup> most obedient humble servant,

"J. WEMYSS.

"London, May 21, 1719."

During the next four years of Mr. William's career at Westminster School the following is the only anecdote of him handed down to us:—

"Lady Kinnoul, in one of the vacations, invited him to her home, where, observing him with a pen in his hand, and seemingly thoughtful, she asked him 'if he was writing his theme, and what in plain English the theme was?' The schoolboy's smart answer rather surprised her ladyship—"What is that to you?" She replied, 'How can you be so rude? I asked you very civilly a plain question, and did not expect from a schoolboy such a pertanswer.' The reply was, 'Indeed my lady,

<sup>1</sup> There is an item in Mr. Barclay's accounts showing that the balance had been paid by him:

1719. Oct. 17. It. Paid to Mrs. *Janet Cuninghame* 22 lib. 5*s.* 9*d.*  
ster., on account of *Mr. Wm. Murray*, my Lord's son, on  
*Mr. Wemyss'* letter to *Mrs. Janet*, and *Mrs. Janet's* receipt  
and my Lord's verball order at Scone to pay it. Inde. - 267 09 00

Money for Mr. *Wm.*'s use appears to have been remitted by Mr. Barclay to Mr. Wemyss:

1720. Jany. 28. It. To Peter Crawford, factor for a bill of £25  
ster., drawn by him payable to the Compter on George  
Middleton Goldsmith in London, and indorsed by the  
Compter at my Lord's order to James Weems, Apothe-  
carie in London, for behoof of Mr. William Murray, my  
Lord's son—the money and exchange to Peter Crawford  
being £25 10*s.* Inde. - - - - - £306 00 00

The bill had duly reached its destination, as appears from the following acknowledgment:—

"Sir,—This comes to acquaint you that I have received the bill of 25 lib. sent by my Lord Stormont's order for the use of his son Mr. William, who is very weill. From

"Sir

"Y<sup>r</sup> humble Servt.

"June 26, 1720."

"Jo. WEMYSS.

<sup>2</sup>This is probably a dark allusion to the court of the Pretender.

I can only answer once more, *What is that to you?* In reality the theme was QUID AD TE PERTINET."<sup>1</sup>

I find general statements of his diligence and rapid progress in his studies :—

"Fortunately," says a respectable biographer, "the school had never been in a more flourishing condition than at the period when he entered it. The number of the boys amounted to five hundred; and, besides the advantage of having for their daily instructors two such eminent scholars as Doctor Friend and Nicholl, they were examined at elections by Bishop Atterbury, who attended in his capacity as Dean of Westminster, Bishop Smalridge as Dean of Christchurch, and Bentley, as Master of Trinity College, Cambridge. The learned rivalry of such men could hardly fail to excite a corresponding emulation among the young scholars who were in the habit of witnessing it; and in the constant competition of talent to which this excitement must have given an additional stimulus, none shone more conspicuous than Murray. It is particularly recorded of him that his superiority was more manifest in the declamations than in any of the other exercises prescribed by the regulations of the school,—a fact, not to be overlooked in the history of one who afterwards, as an orator, equalled if not excelled such competitors as it falls to the lot of few nations or ages to possess. His proficiency in classical attainments was almost equally great."<sup>2</sup>

"During the time of his being at school," says another who was actually his chum, "he gave early proof of his uncommon abilities, not so much in his *poetry* as in his other *exercises*, and particularly in his *declamations*, which were sure tokens and prognostics of that eloquence which grew up to such maturity and perfection at the bar and in both houses of parliament."<sup>3</sup>

Certain it is, that, at the election in May, 1723, after a rigorous examination, it was found that William Murray was still "*Dux*," for he stood the first on the list of the King's scholars who were to be sent on the foundation to Christ Church. The following is an exact copy of his admission there :—

"Trin. Term. 1723, June 18.

Æd. Xti. Gul. Murray 18.

David f. Civ. Bath.

C. Som. V. Com. fil.

T. Wenman, C. A."

It will be observed that the place of his nativity is described as *Bath* instead of *Perth*. "Sir William Blackstone is said to have mentioned this curious circumstance to the Lord Chief Justice of the King's Bench while he had the honor to sit with him in that court, when Lord Mansfield answered 'that possibly the broad pronunciation of the person who gave in the description was the origin of the mistake.'<sup>4</sup> This person was no other than himself, and he most likely misled the registrar

<sup>1</sup> Holliday, p. 2.

<sup>2</sup> Welsby, *Lives of Eminent Judges*, p. 370.

<sup>3</sup> Bishop Newton, p. 21.

<sup>4</sup> Holliday, p. 2.



by aiming at an English pronunciation, and calling the place *Parth*,—being still under the delusion, which holds some Scotsmen all their lives, that what is not Scotch in pronunciation and in idiom must necessarily be English.<sup>1</sup>

At this period of his life it was intended that he should take orders in the English Church; and his family, if they did not hope that he would rise to be Archbishop of Canterbury, reckoned with confidence upon his being comfortably placed in a good college living. This last, probably, would have been his fate, and he would have been noticed after his death only in the parish register or in a pedigree of the Stormont-Murrays, had it not been for the accidental interference of an English nobleman wholly unconnected with him by blood or affinity. When he first left home, the notion of his being called to the bar in England had been talked of, but had been abandoned upon ascertaining that the expenses of a legal education were far greater in England than in Scotland, and would much exceed what the noble Viscount his father could afford. The young man himself acknowledged the necessity imposed upon him of taking orders; but when at Westminster School, having occasionally visited the great hall and heard the pleadings of Yorke and Talbot, he felt (as he described it) “a *calling* for the profession of the law,” and he regretted that he could not try the effect of his eloquence at the bar rather than in the pulpit, notwithstanding the advantage which, as an ecclesiastical orator, he would enjoy of being freed from all apprehension of immediate refutation or reply. About the time of his removal to Oxford, he had casually mentioned his disappointment to a schoolfellow, a son of the first Lord Foley. This peer, who had [A. D. 1723, 1724.] amassed enormous riches from the invention of manufacturing iron by means of coal instead of wood, possessed a liberal and enlightened mind, and, having seen William Murray at his country house during the holidays, had discovered his genius, and had taken a fancy for him. Hearing that, on account of the narrow circumstances of his family, he was going, rather reluctantly, to prepare himself for ordination, instead of following the bent of his genius to study the law, he, in the most generous and delicate manner, encouraged him to enter a career for which he was so well qualified, and undertook to assist him with the requisite supplies till the certain success which awaited him should enable him to repay the advance with interest. The offer so handsomely made was frankly accepted, and it had the auspicious result of establishing a real friendship between the parties notwithstanding inequality of years.

With the consent of his family, the arrangement was made that Murray should be entered of an Inn of Court while he remained an undergraduate at Oxford; and, on the 23d day of April, 1724, he became a

<sup>1</sup> In this instance he might easily have been misled by analogy, which can so little be trusted in English pronunciation, as *e* before *r* is often pronounced like an *a*:—Berkshire, Barkshire; Clerk, Clark; Serjeant, Sarjeant. *P* and *B* are easily misunderstood for each other; and the *r* would be hardly discernible between *a* and *th*;—so that we have PERTH converted into BATH.

member of the Honorable Society of Lincoln's Inn, although he did not begin to keep his terms there till he had taken his bachelor's degree.<sup>1</sup>

He resided at Oxford near four years, and made all his studies subservient to the profession which of his own liking he had adopted,—his energy being doubled from his considering the responsibility he had incurred, by deviating from the beaten track to [A. D. 1725–1727.] obscure competence which lay open before him.

We have not any minute account of the disposition of his hours during his residence at Oxford, but we know that he escaped pretty well the two great perils to which he was exposed, "*Port and Prejudice.*" While Henley and other contemporaries were fostering the gout, and insuring premature old age, he preserved his constitution unimpaired. There is reason to think that he still inwardly cherished the high-Tory, or rather Jacobitical, principles which he had imbibed under the paternal roof; but he prudently concealed them, except on very rare occasions when he was heated by wine. Strange to say, in the atmosphere of bigotry which he breathed, although himself sincerely attached to the episcopalian form of church government, he entertained and professed liberal sentiments on religion, and strenuously advocated the cause of toleration against the universal voice of his companions, who, while they would have hesitated about *burning* Dissenters, were eager rigidly to enforce against them all the statutes by which they were deprived of civil privileges.

Regular in chapel and at lecture, he did not neglect the peculiar studies of the place; and, without joining in the superstitious worship of Aristotle, he had the discernment to discover and the candor to acknowledge this philosopher to be the greatest master who had yet appeared, not only of the art of reasoning but of politics and literary criticism. Such discipline he submitted to in deference to authority: when he gratified the passion of his own bosom he devoted himself to ORATORY, by which his grand objects were to be accomplished. Those who look upon him with admiration as the antagonist of Chatham, and

<sup>1</sup> "Hon<sup>ble</sup> Willus Murray filius p<sup>r</sup>. hon<sup>ble</sup> Vicecomitis Stormont admissus est in Societatem hujus Hospicii vicesimo tertio die Aprilis anno regni D<sup>ni</sup> n<sup>ri</sup> Georgii dei gra Magnæ Britanniæ Fræ & Hibniæ Regis, &c. decimo annoq. D<sup>ni</sup> 1724. Et solvit ad usum Hospicii p<sup>r</sup>. d. £3 3s. 4d.

"Manucaptor { Will. Hamilton.  
A. V. Hamilton.  
"Admissus. John Wather."

Half the dues for which he was liable before he began to reside and keep his terms was afterwards remitted to him:—

"At a Council held the 12th day of November, 1728.

"Upon the petition of the Hon<sup>ble</sup> William Murray, Esq<sup>re</sup>. a fellow of this Society, praying leave to compound for his absent Comons, it is Ordered that he be at liberty to compound for the same on paymt of half w<sup>t</sup> is due to the Treasurer of this Society before the next Council; but if the said Mr. Murray shall within two years from this time be called to the Barr, sell his Chamber, or leave this Society, then it is Ordered that in either of the said cases he shall pay the rem<sup>t</sup> of w<sup>t</sup> is due for his Absent Comons."—*Books of Lincoln's Inn.*

who would rival his fame, should be undeceived if they suppose that oratorical skill is merely the gift of nature, and should know by what laborious efforts it is acquired. He read systematically all that had been written upon the subject, and he made himself familiar with all the ancient orators. Aspiring to be a lawyer and a statesman, Cicero was naturally his chief favorite; and he used to declare that there was not a single oration extant of this illustrious ornament of the forum and the senate-house which he had not, while at Oxford, translated into English, and, after an interval, according to the best of his ability, retranslated into Latin.

He likewise diligently practised original composition, both in Latin and English, knowing that there is no other method by which correctness and condensation in extempore speaking can be acquired. From the fatal conflagration which destroyed his papers in 1780 there was preserved a fragment of a Latin Essay, written by him on a *chef d'œuvre* of Demosthenes, *Περὶ Στέφανον*. A few extracts from it may show his acquaintance with the dialect which he used, and his tasteful appreciation of the divine composition which he criticised. After stating the occasion of the oration, and analysing its different divisions, he exclaims—

“Quâ solemnitate exordii animos auditorum incitat! Deosque deasque omnes benevolentiae suæ in civitatem testes adhibet! Quam sibi modestâ meritorum in cives suos commemoratione ad se audiendum munivit viam! Dum nihil aliud videtur elaborare quam ut cum æquo animo iudices audiant, efficit ut prosequantur benevolo. Mentibus omnium ad lenitatem misericordiamque erga se revocatis, de legibus pauca disceptat. Quâ subtilitate Æschinis interpretationem oppugnat et evertit, suam defendit et probat: Quam acuta et enucleata est hæc tota disceptatio, quam pressa! Festinat enim ad res suas pro Republicâ gestas (quod validissimum causæ firmamentum videbatur) orationem convertere et in uberiori administrationis suæ campo spatari.”<sup>1</sup>

Thus he praises the transition to invective, when the orator, like the dew descending in the evening on a parched field, had soothed the indignation excited by the peroration of his antagonist:—

“Quis flexanimam Demosthenis potentiam digne explicaverit, quæ summissio placidoque principio in animos omnium, velut in accensos agros taciturno roris imbre leniter fluentes incendium quod reliquerit Æschines extinguit, populique furorem placat. Mox vehemens et acer

<sup>1</sup> “With what solemnity his exordium seizes the hearts of his audience! He adduces all the gods and goddesses as witnesses of his love for his country. With what a modest reference to his own services does he prepare the way for a favorable hearing! While he professes only to implore that they will listen to him with the impartiality of judges, he renders them all eager for his acquittal. Their minds being thus softened towards him, he proceeds briefly to consider the legal and constitutional principles by which the cause was to be decided. With what subtlety does he combat and destroy the positions of Æschines—while he defends and establishes his own! How acute, how terse, and how condensed is this portion of his discourse! For he hurries on to his own measures and to his administration of public affairs, upon which judgment was to be pronounced.”

vi quâdem incredibili auditores extra se, contra Æschinem calumniatorem odio, mercenarium Philippi contemptu proditorem patriæ irâ rapit.”<sup>1</sup>

In conclusion he draws a parallel between the respective chiefs of Greek and Roman eloquence; giving on this occasion the preference to the former, although the latter was known really most to have occupied his time, and to have engaged his affections:—

“Demostheni, qui sub historici personâ oratorum celat, qui felici eâ audaciâ quam veritas sola parit, beneficiorum cives, benevolentiae suæ Deos testes adhibet, credimus et favemus. Cicero, placatis iudicum animis quantum ipsi patiuntur accepit, tanta tamen ejus facundia, ut quidvis impetrare posse videatur. Non *petit* Demosthenes sed *rapit*, sed impetu quodam penè divino, sententias de eorum manibus *extorquet*. Dulci Ciceronis arte veluti Sirenum cantu, delectati iudices cum illo malunt errare, quam cum aliis rectè sentire. Demostheni tanta auctoritas inest, ut *pudent* dissentire, et cum fulmine eloquentiæ *transversè* feruntur auditores, non oratoris arte abripi, sed naturam sequi, sed rectæ rationi se parere credunt. Cum orationes suas contra Clodium aut Catilinam figuris auget, elocutione Tullius exornat, circumstantis populi clamoribus etiam admiratione excipitur. Cum Demosthenes contra Æschinem iis affectibus, qui ab *ipsâ naturâ* oriuntur, suam animat iracundiam, dicentis obliviscuntur Athenienses, et (ut historiæ proditum est) *eodem* furore omnes inflammati mercenarium Æschinem appellant.”<sup>2</sup>

<sup>1</sup> “Who shall ever be able to explain the mastery of Demosthenes over the human affections? Beginning in a mild and subdued tone, like dew gently descending on the parched fields, he extinguishes the flame which Æschines had raised, and soothes the popular fury. But soon after, having become vehement and sarcastic,—with miraculous force he controls at will the feelings of his hearers, and holds up Æschines to their indignation, hatred and contempt, as a calumniator, as the mercenary tool of Philip, and as the betrayer of his native land.”

<sup>2</sup> “When Demosthenes, concealing the skilful advocate under the disguise of a plain narrator of facts, with what felicitous boldness which is supposed to spring from truth alone, he appeals to his fellow citizens as witnesses of the benefits he has conferred upon them, and to the Gods themselves to prove the ardent patriotism that had ever animated his bosom, we implicitly believe all he says, and, warmly taking his side, we are impatient to see him vindicated and rewarded. Cicero having convinced the understandings of the judges before whom he pleads, they after deliberation, pronounce in his favor the sentence which they think just; the eloquence displayed by him, however, being so brilliant, that we conceive there is nothing which would not be conceded to it. Demosthenes does not *ask*—he *seizes*—by an energy almost divine, he wrests from the hands of the judges the sentence which he desires. Being captivated by the witching art of Cicero as by the song of the Sirens, they are better pleased to go astray with him than to decide righteously with others. Such authority does Demosthenes carry along with him, that his hearers are ashamed to differ from him, and, when struck by the lightning of his eloquence, they do not seem to be carried away by the art of the orator, but believe themselves to obey a natural impulse, and to yield to the dictates of right reason. When Cicero ornaments with the choicest figures of rhetoric and beauties of language his declamation against Clodius or Cataline, he is received with the admiration and plaudits of surrounding multitudes. When Demosthenes kindled rage against his accuser by giving vent to feelings which seem to rise spontaneously in the human heart, the Athenian people forget



This criticism shows that Murray, long before he ever spoke in public, had reflected much and deeply on the principles of the art in which, with a view to the distant future, he was earnestly endeavoring to improve himself, and that he had been early accustomed to calculate by what means a particular effect is most likely to be produced on the passions or the understandings of a popular assembly.

He continued, but with far less success, to cultivate the Muses in the mechanical fashion which he had learned at Westminster; [A. D. 1727.] and, on the death of George I., he entered into a competition with all the most accomplished versifiers then at Oxford to celebrate the praises of that poetry-hating monarch.<sup>1</sup>

The art of grinding Latin verses must then have been extremely low at Oxford, for Murray's poem gained the first prize. I do not pretend to be by any means a nice judge of such compositions, but it seems to me a very wretched production, and I could point out much better imitations in the *MUSÆ EDINENSES*. Thus he begins with a description of the terrible blow by which the sword of fate had deprived the United Kingdom of GEORGE, the conqueror of the Rhine and of the Danube:—

“Quo percussisti Britonis conjunctaque regna  
Ictu, Fati ensis! trepidant ipsa atria regum  
Ingentemque stupet mœrens Europa ruinam.  
Georgius occubuit Rheni pacator et Istri:  
Et dubitamus adhuc animam accumulare supremis.  
Egregiam donis! quondam decus omne Britannis  
Spargite flore pio cineres, olæque *Minerva*  
Inventrix, et Phœbe pater cui laurea cura!  
Hic Juvenis laurum sovit, longævus olivam.”<sup>2</sup>

After expatiating at great length upon the achievements and virtues of the deceased, lest the nation should be thrown into absolute despair by such a heavy privation, he concludes with a panegyric on the “other hope of Britain,” under whose enlightened sway they were about to live,

the crimes imputed to the accused, and (as history relates), all inflamed with the same fury, hooted at Æschines as a wretch who had been suborned to bring a false charge against an innocent man.”

N. B. I am afraid that, from long disuse, my translation is very imperfect, although I was once accustomed to the exercise from which Murray is supposed to have derived such advantage.

<sup>1</sup> Trying to speak English, when refusing to allow a poem to be dedicated to him, he exclaimed, “I hate all Boets and Bainters!”

<sup>2</sup> “Thou sword of fate, with what a fearful blow  
Hast thou made England shake from top to toe.  
Lo! Windsor's royal halls are filled with dread;  
And Europe stunn'd, laments the mighty dead.  
See George, who both the Danube and the Rhine  
Subdued and civilized, at last resign  
His throne and breath. And shall the grateful Muse  
Her tribute to such wondrous worth refuse?  
No; let Minerva strew with Phœbus here  
Her olive with his laurel on His bier,  
Whose warlike youth to laurell'd honor led,  
Whilst peaceful olive crown'd his aged head.”

and who was not less tenderly beloved by the gownsmen of Oxford than by his spouse, Queen Caroline:—

“*Tu tamen interea, quondam spes altera gentis  
Nunc decus et columen, populo plaudente, Britanno  
Succedis Solio; ordinibus discordia cessit  
In te diversis, patriæ vox una salutat.  
Hos inter plausus procerum plebisque benigno  
Accipias Rex ore, vovet tibi terga togata,  
Quæ, studiosa cohors operum! pars parva tuorum  
Non ingrata tamen; quoniam nec amantior ipsa  
Est Carolina tui, licet illi pronuba Juno  
Et Venus æterna cinxerunt pectora flamma.*”<sup>1</sup>

It is curious to think that the Elder Pitt, between whom and the two succeeding Georges there was such mortal enmity, on this occasion tried to gain the prize for extolling George I.,—certainly in no degree superior to them—and is supposed, by reason of his disappointment, to have contracted a dislike of the fortunate candidate, which he cherished to his dying day. No one could then have foreseen the more brilliant strife in which the rivals were afterwards engaged as leaders of the opposite factions in the state.<sup>2</sup>

Murray having taken his degree of B. A., without any opportunity of testing his proficiency by Senate-house honors, was transferred to London. He obtained chambers in Lincoln’s Inn,<sup>3</sup> and began in good earnest to

<sup>1</sup> “But cease, my Muse, these fond lamenting strains;  
Our rising hope, and now our glory reigns.  
Hark to that shout! the people’s joyful tone;  
A second George ascends the British throne!  
Lo! discord ceases, all at once agree,  
United England looks, Great Sire, to thee.  
Amidst these sounds, whilst all at once rejoice,  
Thy band of Gownsmen raise their loyal voice,  
Though small indeed their offerings seem to prove,  
Deign to behold their merits in their love—  
Not Carolina’s more,—though Juno’s crown  
And Venus’ form have mark’d her for thine own.”

The poem is signed—

“GUL. MURRAY,  
Honoratiss. Vicecom. de Stormont, Fil.  
Ædis Christi alumnus.”

<sup>2</sup> The following is Mr. Macaulay’s criticism on the unsuccessful lines of Pitt:—“They prove that the young student had but a very limited knowledge even of the mechanical part of his art. All true Etonians will hear with concern that their illustrious schoolfellow is guilty of making the first syllable in *labenti* short. The matter of the poem is as worthless as that of any college exercise that was ever written before or since. There is of course much about Mars, Themis, Neptune, and Cocytus. The Muses are earnestly entreated to weep over the urn of CÆSAR; for CÆSAR, says the poet, loved the Muses; CÆSAR, who could not read a line of Pope, and who loved nothing but punch and fat women.”—*Essays*, ii. 150.

<sup>3</sup> Till he had been several years at the bar he lived in a very small set, three stories high, No. 1. “Old Square,” then called *Gatehouse Court*. They were pointed out to me when I commenced my career in a similar set, No. 2, three stories high, next door; and there are several entries in the books of the Society connecting him with them.

acquire a knowledge of his profession. While at Oxford he had attended lectures on the Pandects of Justinian, which gave him a permanent taste for that noble system of jurisprudence.

Unfortunately we have only an imperfect account of the course of study which produced the most accomplished Judge who ever presided in the Court of King's Bench. We know that he owed every thing to private and spontaneous exertion. The false maxim on which legal education now rests in England, "every man to learn as he likes,"<sup>1</sup> receives some countenance from his example. When there is a combination of enthusiasm and steady perseverance, the want of means of instruction provided by the state is little felt, and tests of proficiency by public examination may be dispensed with; but I conceive that, in regard to the great mass of students entering a learned profession, it is necessary, by institution and discipline, to guide inexperience, to stimulate indolence, to correct the propensity to dissipation, and to have some assurance that those intrusted with defending life and property are decently well qualified for the duties which they may be called upon to discharge.

During the three years that Mr. Murray passed as a student in Lincoln's Inn, all that the benchers required of him was to dine in the hall five days each term, and once a term to read the first sentence of a paper prepared for him by the steward, called "an exercise," a remnant of the ancient custom of scholastic disputation. But, by an admirable disposition of his time, while he mixed in society and still attended to elegant literature, he was sedulously and skilfully preparing himself to be a great advocate and the greatest of judges.

First, he thoroughly grounded himself in ancient and modern history by a perusal of the most eminent original historians. He then applied diligently to ethics, which he mastered, and from his own experience he always strongly recommended the philosophical works of Cicero. But he never showed any taste for metaphysics, which were now engrossing the attention of his countrymen. The foundation of jurisprudence he maintained to be the Roman civil law. Thence he proceeded to international law, doing full justice to the learning and genius of Grotius, its codifier and almost its founder. Next he entered on the feudal law, without which our law of real property must be very imperfectly understood. Here he showed his discernment by taking for his guide and his favorite his countryman CRAIG, whose treatise *DE FEUDIS* he justly thought was much to be preferred to any juridical work which England had then produced. Next came the English municipal law, and this he was obliged to search for in very crabbed and uncouth compositions, which often filled him with disgust and sometimes with despair. He was pleased with Bracton, and could not deny the terseness and perspicuity of Littleton; but he never could be made to fall down and worship Lord Coke, whom we are taught to regard as the god of our idolatry. Nay, he was unjust to the merits of this quaint and immethodical though learned and accurate writer, and used constantly to

<sup>1</sup> Or "*laissez rien faire.*"

be laughing at his etymologies,—as, that “parliament is derived from *parler le ment* ;” and his trying to give reasons for all that the law enacts, as his defence of the old sentence of mutilation in high treason “to show that the traitor ought to have had no ancestors, and should have no posterity.” Indeed, instead of being, like Sir William Blackstone, a legal *optimist*, he did not sufficiently appreciate the merits of the old common law ; overlooking the love of public liberty displayed by many of its maxims, and its admirably contrived machinery for separating questions of law from questions of fact, and for bringing a suit to the real point on which it ought to be determined. But he submitted to the drudgery of toiling through tiresome text-books and rubbishy reports, and he became as well acquainted with “collateral warranties” and “recoveries with double voucher” as lawyers who, never travelling beyond their black-letter lore, venerated these processes as the perfection of human reason.

Expecting to be employed in appeals from Scotland, which, since the Union, were decided at the bar of the House of Lords, he paid much attention to the law of that country, and he expressed satisfaction with the methodical arrangement and precise definitions of McKenzie and Stair. But his true delight was to dip into the juridical writers of France, that he might see how the Roman and feudal laws had been blended in the different provinces of that kingdom ; and above all to pore over the admirable commercial code recently promulgated there under the title of “ORDINANCE DE LA MARINE,” which he hoped one day to introduce here by well-considered judicial decisions,—a bright vision which was afterwards realised.

He never had the advantage of being initiated in the mysteries of legal warfare by any practitioner ; the *pupilising* system, now in such vigor, having been introduced in the following generation by the celebrated Tom Warren<sup>1</sup> and Mr. Justice Buller.<sup>2</sup> He attended a debating society, where knotty questions of law were discussed ; and such pains did he take in getting up his arguments, that the notes he then made were frequently of use to him when he was at the bar, and even after he had been elevated to the bench. But his principal resource for gaining experience was attending the courts at Westminster and listening to the judgments of Chief Justice Raymond. He continued to think that, in the absence of academical lectures and examination, such an attendance is the best opportunity which candidates for the bar enjoy of gaining a liberal knowledge of their profession. For this reason, considering it for the public welfare as well as for their advantage individually that they should be properly instructed,—when presiding in the King’s Bench he was in the constant habit of explaining the intricacies of the cases tried before him, and giving the reasons of his judgments, not only

<sup>1</sup> My great-great-grandfather in Law.

<sup>2</sup> Lord Macclesfield and Lord Hardwicke had each sat in a law office before being called to the Bar ; but the former had been an attorney, and the latter was intended for one.



to satisfy the parties, but, as he expressed it, "for the sake of the students."<sup>1</sup>

The marvellous circumstance is, that, in the midst of these multifarious and severe studies, Mr. Murray was "drinking champagne with the wits."<sup>2</sup> I am almost afraid to record it, lest it should seduce some heedless youths into the false and deceitful notion that dissipation is compatible with success in our profession. But let them remember, that before he went to *Will's* or *Button's* he had been eight or ten hours busily employed in professional studies; and that, when he associated with gay companions he never so indulged as to be prevented from rising to light his own fire next morning, or from sitting down to his books with a sound stomach and a clear head. Above all, before they expose themselves to temptation, let them wait till such *noctes cœnæque delûm* as were enjoyed by Murray are actually in their power.

The most intimate and familiar friend he had in the world was ALEXANDER POPE!!! To this prince of poets he had been introduced while at Westminster School, by his countryman Lord Marchmont, and a warm and steady attachment sprang up between them. The young Scot was at first exceedingly flattered and delighted by the notice of a writer of such celebrity, whose PASTORALS he had got by heart when a child, but whom, till he was sent to England, he had never hoped to behold. Afterwards he had the good taste to relish the exquisite powers of conversation which the bard could display in the company of those he liked, and he was touched by experiencing constant kindness from one who was disposed to treat nobles and kings with disdain. Pope, on the other hand, intuitively discovered the genius of this juvenile worshipper, was struck by his extraordinary accomplishments, agreeable manners, ingenious countenance, and, (it is said,) above all, by the *silvery tones of his voice*, which seemed then, and ever after, to have doubled the effect of all his other powers to win his way in the world.<sup>3</sup> In such favor was Murray, that when he had adopted the law as his profession, and he came to reside as a student at Lincoln's Inn, the autocrat of the literary world, anxious for his success, actually undertook to teach him oratory;—not the composition of orations, but the varying attitudes and intonation with which they should be delivered. Murray had frequent invitations to Twickenham; and Pope, coming to Lincoln's Inn, would spend hours in instructing him. One day the pupil was surprised by a gay Templar, who could take the liberty of entering his rooms without the ceremonious introduction of a servant, in the act of practising the graces of a speaker

<sup>1</sup> I began my legal studentship in the last days of Lord Kenyon. The court at Westminster was so constructed, that we could have no communication with him; but I have a lively recollection that at Guildhall, the students having a box close by him, he handed the record to us, and he would point out to us the important issues to be tried. I do not remember that he ever publicly alluded to our presence.

<sup>2</sup> Boswell's Life of Johnson.

<sup>3</sup> The fanciful may suppose that their harmony arose from *vocal unison*. Dr. Johnson, in his Life of Pope, says, "His voice when he was young, was so pleasing, that he was called in fondness the *little nightingale*."

at a glass, while Pope sat by the character of preceptor. Bishop Warburton accounts for the extraordinary marks of kindness which Murray thus experienced:—"Mr. Pope had all the warmth of affection for this great lawyer, and indeed no man ever more deserved to have a poet for his friend; in the obtaining of which, as neither vanity, party, nor fear had a share, so he supported his title to it by all the offices of a generous and true friendship."<sup>1</sup>

Lord Mansfield's biographers represent him as now making the "grand tour," and, from the language they employ, it might be [A. D. 1730.] supposed that he spent several years in wandering over distant lands and sojourning at foreign courts.<sup>2</sup> He did cross the English Channel, but, upon examining dates, it will be found that his "travels over the continent of Europe" shrink into a long-vacation trip to France and Italy, which most practising lawyers have taken. On the 24th of June, 1730, after keeping Trinity Term at Lincoln's Inn, he was present in the schools at Oxford, and, with the usual forms, received the degree of M.A. On the 23d day of November following, he was called to the bar in Lincoln's Inn Hall; and he probably had returned some weeks previously, to make preparations for commencing his professional career.<sup>3</sup> I believe there is not extant any account of his adventures—but thus speculates one author, who would have us believe that, as Gibbon conceived the plan of his "Decline and Fall" on viewing the ruins of the Capitol, so Murray was first fired with the ambition of being a great lawyer and orator on beholding the scene where Cicero had triumphed:—

"At Rome Mr. Murray was probably inspired and animated with the love of Ciceronian eloquence; at Rome he was prompted to make Cicero his great example and his theme. At Tusculum, and in his perambulations over classical ground, why might he not be emulous to lay the foundation of that noble superstructure of bright fame which he soon raised after he became a member of Lincoln's Inn."<sup>4</sup>

I make no doubt that, ever industrious and eager for improvement, he turned his jaunt of two or three months to the best advantage, and that, having introductions to our ministers abroad and to the most eminent literary characters in the cities which he visited, he saw and reflected, and profited moré in this short interval than the ordinary "sons of earth," who waste years on the Continent, chiefly employed in criticising the

<sup>1</sup> Annotations on Pope's Imitation of the Sixth Epistle of the First Book of Horace.

<sup>2</sup> Lord Brougham describes him as "enjoying all the advantages of a finished classical education; adding to this the enlargement of mind derived from foreign travel, undertaken at an age when attentive observation can be accompanied by reflection." (Statesmen, i. 100.)

<sup>3</sup> "At a Council held the 23d day of Nov., 1730.—Ordered that the Hon<sup>ble</sup> Wm. Murray, Esq<sup>re</sup>., one of the fellows of this Society, being of full standing, and having observed the rules of this Society, and performed all his exercises, he called to the bar, first paying all his arrears and duties to this Society; and that he be published at the next Exercises in the Hall."

<sup>4</sup> Holliday, pp. 9-10.

performances of opera singers, or in exposing themselves to ridicule for their determined adherence to English prejudices and absurdities.

When he put on the long robe, it may be safely affirmed that there had not hitherto appeared at the English bar a young [NOVEMBER.] man so well qualified by his acquirements to follow the law as a *liberal* profession. Without having become a deep **black letter** lawyer, he was scientifically familiar with our municipal jurisprudence, and capable of conquering any particular point in it which he might have occasion to encounter. He had made himself acquainted not only with international law, but with the codes of all the most civilized nations, ancient and modern; he was an elegant classical scholar; he was thoroughly imbued with the literature of his own country; he had profoundly studied our mixed constitution; he had a sincere desire to be of service to his country; and he was animated by a noble aspiration after honorable fame. A very different being this from the *dull plodder* who, having gained a knowledge of forms and technical rules, looks only to make his bread by law as a trade—or the *empty adventurer*, who expects to secure wealth and high office by a flashy speech!

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## CHAPTER XXXI.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE WAS MADE SOLICITOR GENERAL AND ENTERED THE HOUSE OF COMMONS.

MURRAY remained at the bar above two years without a brief, or, at least, without being employed in a cause of importance. During this trying interval his courage fully [A. D. 1730–1732.] supported him, and, although he must have passed anxious moments, he still felt the confidence of ultimate success which genius sometimes prompts. His friends were most afraid, from his literary connexions and propensities, that he would be induced to relax his resolution to raise himself by the law, and that he would attempt authorship or prematurely mix in political strife. The recent examples of Addison and Prior were very seducing to those who might be disposed to prefer the primrose path of poetry. But Murray now, and ever after, displayed a rooted attachment to his profession, and a firm purpose to establish his reputation by reaching its highest honors. He therefore actually declined an offer made to him to bring him immediately into parliament,—being convinced that a barrister ought not, in prudence, to expose himself to this distraction till he is fully established in practice and may fairly expect to be appointed Solicitor General; and we shall see that he afterwards preferred a seat on the bench to the leadership of the House of Commons and the near prospect of being Prime Minister. I do not believe that he looked upon the fame of a great judge with more respect than that of a great poet or a great statesman, but he made a prudent

estimate of his own powers. He certainly had not sufficient imagination for poetry, or moral courage for statesmanship, although his fine understanding and his eloquence were sure to command success in the career on which he had entered. Thus, in the words which he himself employed, "he had genius and resolution enough to raise himself above the common level :"

"Victorque virum volitare per ora."

Never absent from chambers when there was a possibility of a client calling to consult him, or from Westminster Hall when a diligent young barrister ought to be seen there, he still contrived to keep up an intercourse with the witty and the powerful. He now took chambers at No. 5, King's Bench Walk, in the Temple ; and here Pope frequently visited him in the evening, to save him from the suspicion of neglecting his profession by haunting coffee-houses, as he had allowed himself to do while a student. We may easily imagine that the lawyer and the poet occasionally met at the *Grecian*, or *Dick's*, or *The Devil's Tavern*, which were close by,—or in the shop of Lintot between the two Temples, or that of Tonson in Chancery Lane ; or that they went together to the theatre in Lincoln's Inn Fields, to see the performances of Betterton and Mrs. Clive ;—but for such meetings I find no authority ; and we must tell what we know to be true, not what we consider to be probable.

Murray continued as eager as when he was a student under the bar to increase his store of professional learning, and by no means (after the common fashion of lawyers who have had an academical education) abandoned liberal studies. Through the busiest part of his life he found time to keep up his acquaintance with the Greek and Latin classics, and to gain a knowledge of new publications of merit soon after they issued from the press. In an interval of leisure he showed that he was qualified, like M. Guizot, the Prime Minister of Louis Philippe, to gain celebrity as a professor in a university. For the benefit of the heir of the ducal house of Portland, he wrote two very long letters to that young nobleman "On the Study of Ancient and Modern History,"—which would constitute an admirable syllabus for a course of lectures. It is with some humiliation that I look to the members of the profession at the present day without being able, either at the bar or the bench, to discover any one with such an extensive, exact, and philosophical acquaintance with historical books, historical events, and historical characters. You would suppose that he had lived in every age which he describes,—having witnessed the occurrences which he narrates, and conversed with the men to whom he presents his readers. In ancient history I think he most excites admiration by his remarks on the causes of the decline of the Roman empire, which, even with the assistance of Montesquieu and Bossuet, till Gibbon arose few so thoroughly understood. The familiarity which he displays with modern history is quite astounding,—and I had almost said *appalling*, for it produces a painful consciousness of inferiority, and creates remorse for time mis-spent. He seems to have carried in his memory every remark of every French historical



writer from Philip de Comines to Voltaire; and by a few masterly strokes he gives a better notion of Clovis, Charlemagne, Louis XI., and Henry IV., than is to be gathered from perusing many tomes of ordinary bookmakers.<sup>1</sup> Some will regret that he did not devote himself to historical composition, and so wipe off the reproach which in this department of our literature attached to it before the age of Robertson and Hume. But I must proceed to show what benefits he conferred on the community in the employments to which his destiny carried him.

It has often been said that Lord Mansfield "never knew the difference between total destitution and an income of 3000*l.* a year." This is a common instance of a perversion of truth from a love of the marvellous. He had been above seven years at the bar before his gains reached or approached this amount; but from his third year, at all events, he had very encouraging practice, and he must have been comparatively wealthy.

He had long before dedicated his first professional earnings to the purchase of a set of tea china, with suitable silver plate, for his sister-in-law, Lady Stormont, who, after his father's death, had sent him not only supplies of Scotch marmalade, but pecuniary contributions to assist him while he was a student at Lincoln's [A. D. 1763.] Inn.

The earliest success he met with was, as he had anticipated, at the bar of the House of Lords. Sir Philip Yorke and Talbot were there always opposed to each other as leaders. In Scotch cases, Mr. W. Hamilton, a Scotch advocate, (father of Single-speech Hamilton,) having settled in London soon after the Union, was almost always the junior on one side; and Murray from a good word spoken in his favor by his friends to the Scotch solicitors, and from the pains-taking disposition for which he soon gained credit, was generally on the other.

He attracted much notice as counsel for the Respondent, along with Mr. Talbot, against Sir Philip Yorke and Mr. Hamilton, in the case of *Patterson v. Graham*, heard on the 12th of March, 1732-3. Although this was an appeal from the Court of Sessions, it excited very lively interest, and persons in all ranks of life crowded to the bar of the House of Lords to listen to the arguments upon it, for it related to the South Sea Bubble, which had propagated an epidemic madness in the nation. The respondent, residing in the city of Edinburgh, to which the malady had penetrated, employed the appellant in London to buy some South Sea stock when it was at an extravagant height, and was expected to rise still higher. But immediately after the purchase it fell down to nothing, and was utterly unsaleable and worthless. The respondent then sued the appellant for damages, on the ground that he had been

<sup>1</sup> Holliday, 12-23. Murray seems to have had rather an excessive admiration of French genius, to which Scotsmen are liable; and he had a respect for Voltaire which few now would have the courage to confess, for, since the French Revolution, an indiscriminate abuse of this author has been in England the test of orthodoxy and loyalty.

<sup>2</sup> Character of Lord Mansfield by Mr. Buller; Seward's Anecdotes, iv. 492.; Roscoe's Eminent Lawyers, 171.

deceived and defrauded; and the Scotch judges, out of compassion to their countrymen, decreed that the appellant, the English broker, should reimburse him to the amount of the purchase-money and interest at 5 per cent. Mr. Murray tried to support this decree by much ingenuity, and by a very striking description of the frauds practised by the concoctors of the late gigantic conspiracy and the sufferings of their victims. He was unsuccessful; for the House of Lords yielded to the reasoning on the other side, that his client had only to blame his own covetousness and credulity, but he excited great admiration by the gallant stand he had made in an unequal fight.<sup>1</sup>

In a few days after, he gained still higher credit as counsel for the young Marquis of Annandale, who was in a state of mental imbecility, and whose companion or keeper was the philosopher David Hume. The action respected the expenses incurred in the funeral of the late Marquis, which had been conducted in a style of prodigious splendor, without any authority from his executors. There being no decisions whatever in point, the case was to be decided by the principles of the Roman Civil Law; and Murray contended, with much force, that, according to the just view of the *Actio Fúneraria*, the demand could not be supported. This seemed to be the opinion of the House; but their Lordships, not deeming it for the honor of the peerage that a tradesman should suffer who had wished to do honor to a deceased member of their body, deferred giving judgment, and there was a compromise between the parties.<sup>2</sup>

In the following session he distinguished himself still more in a case [1733-34.] of *Moncrieff v. Moncrieff*. Sir Thomas Moncrieff, a baronet of ancient family, but of small fortune, with *five children*, gave the eldest son a liberal education, and wished him to embrace some profession to enable him to make his way in the world. The young gentleman, however, preferred being idle; and after a course of dissipation, married against his father's consent. Sir Thomas, incensed at his conduct, refused to see him till by amendment of life he should deserve forgiveness, but settled upon him an annual allowance of 3000 marks Scotch, making 111*l.* sterling. A process was then commenced in the Court of Session against the father by the son, who claimed as of right an augmentation of this stipend; and the Scotch judges, strangely hallucinating, decreed him 200*l.* sterling a-year.—Mr. Murray, for the appellant, argued thus:—

“In the admitted absence of any statute, or positive rule, or prior decision upon the subject, will any expounder of the law of nature, on which the claim is rested, say that parents who have properly reared their offspring are bound to maintain them in idleness when they are grown up and by industry might easily obtain a maintenance for themselves? or that a son ‘who hearkeneth not to the voice of his father,’ and who therefore by the law of Moses was declared ‘worthy of death,’

<sup>1</sup> Lords' Journals; printed Case, preserved in the Library of the House of Lords.

<sup>2</sup> *Ib.* Murray's leader in this appeal was Duncan Forbes of Culloden, afterwards President.

cannot forfeit this claim by disobedience? Sir Thomas Moncrieff has actually allowed the respondent a sum sufficient not only to supply him with the necessaries, but in that cheap country, with all the conveniences of life. That a son, beyond a necessary subsistence, has a right to a determinate part of his father's property to waste in superfluities, is what was never pretended in any part of the world. By the law of Scotland a man seised in fee simple may disinherit his son, which proceeds upon the supposition that he has an absolute power over it during his life. If this action is founded on the law of nature, nature knows no distinction between the eldest and the youngest child, or between a provision for sons and for daughters; and as the appellant has four other children with the same rights as the respondent, if this decree stands they are entitled to sue him for more than all he has in the world to divide among them, and they may leave him to perish for want."

The House sustained the appeal, and reduced the allowance to the sum which the appellant had offered.<sup>1</sup>

Murray was complimented several times, both by Lord Cowper and Lord Macclesfield, upon the talent he had exhibited in arguing these cases; and thenceforth he was retained in almost all the appeals heard at the bar of the House of Lords, from whatever part of the kingdom they came.

In 1737 he acquired immense *eclat* as counsel against the bill introduced to disfranchise the city of Edinburgh on account of the alleged misconduct of the inhabitants in putting Captain Porteus to death. He dwelt with much force on the insult about to be offered to the capital of Scotland; he pointed out the injustice of punishing the many for the supposed offence of the few; and, although he could not justify the violence which had been committed, he strongly insinuated that the spirit of wild justice which had been displayed, the calmness and solemnity with which the deed had been done, and the utter impossibility of ever detecting, by enormous rewards, the individuals personally engaged in it, redounded to the honor of the [A. D. 1737.] Scottish nation.

The measure was defeated; the freedom of the city of Edinburgh was voted by the corporation to Mr. Murray for the zeal and ability he had displayed as their advocate, and prophecies were uttered copiously all over Scotland that he would one day confer high honor on his country.<sup>2</sup> Hitherto, however, he had fared rather indifferently in Westminster Hall. He did not addict himself to any one court in particular; but,

<sup>1</sup> Lords' Journals, 1733; Holliday, 30-31.

<sup>2</sup> See Parl. Hist., vol. x. p. 187. An act was passed merely to disqualify Wilson, the Lord Provost, and to impose a small fine upon the city. (10 Geo. II. c. 34.) Gilbert Elliot, the ancestor of the Earl of Minto, then a boy of fourteen, afterwards Lord President of the Court of Session, and author of the song, celebrated by Sir Walter Scott in the Lay of the Last Minstrel, "Ambition is no cure for Love," wrote an encomiastic copy of verses on Mr. Murray for his patriotic exertions, which may be found in Holliday, p. 39. They are not so promising as might have been expected.

without a regular flow of business, he went where a stray brief might carry him.

His name does not yet appear in the Common Law or Equity Reports; but we know, from his own statement when Chief Justice of the King's Bench,<sup>1</sup> that, in the year 1736, he was counsel before Lord Talbot in the great case of *Buvot v. Barbut*, where, from his reputation for acquaintance with the law of nations, he was called upon to argue the question "whether a foreign minister can, by engaging in commerce, waive his privilege from arrest?" and "whether an agent of commerce, or a consul, is entitled to the privileges of a public minister?" Although he was too modest to say so, we need not doubt that he eminently distinguished himself on this occasion.

But still his fee-book, when summed up at the end of the year, showed only a very moderate figure; and, according to the graduated gratitude of the old prothonotary, although he ought to have written at the bottom of the page LAUS DEO! he was not yet called upon for LAUS MAGNA!! still less LAUS MAXIMA DEO!!!

For this reason, in spite of his rising fame, he met with a sad disappointment in an affair of the heart. Without being of a romantic turn [A. D. 1738.] of mind he was sincerely attached to a young lady of beauty, accomplishments, and birth, and she listened favorably to his suit; but her family, requiring a sight of his rent-roll, were not contented that her jointure and pin-money should be charged upon his "rood of ground in Westminster Hall," and married her to a squire of broad acres in a midland county. As he was exceedingly dejected by this event, his friend Pope tried to cheer him by addressing to him an imitation of the Sixth of the First Book of Horace's Epistles ("Nil admirari," &c.), thus beginning:—

"Not to admire, is all the art I know  
To make men happy and keep them so.  
Plain truth, dear Murray, needs no flowers of speech:  
So take it in the very words of Creech."

After pointing out various instances of the vanity of human wishes, he thus proceeds:—

"If not so pleased, at a council board rejoice  
To see their judgments hang upon thy voice;  
From morn to night, at Senate, Rolls, and Hall.  
Plead much, read more, dine late, or not at all. •  
But wherefore all this labor, all this strife,  
For fame, for riches, for a noble wife?  
Shall one whom native learning, birth conspired  
To form, not to admire, but be admired,  
Sigh while his Chloe, blind to wit and worth,  
Weds the rich dulness of some son of earth?  
Yet time ennobles or degrades each line;  
It brighten'd Craggs's, and may darken thine.  
And what is fame? the meanest have their day;  
The greatest can but blaze and pass away.

<sup>1</sup> E. T. in Cases temp. Talbot, 181. See Burrow. Holliday must be wrong, making it 1754. See case in my Life of Talbot.



Graced as thou art with all the power of words,  
 So known, so honor'd in the House of Lords—<sup>1</sup>  
 Auspicious scene! another yet is nigh,  
 More silent far, where kings and poets lie;  
 Where Murray, long enough his country's pride,  
 Shall be no more than Tully or than Hyde."

Murray, still disconsolate, took a small cottage on the banks of the Thames, near Twickenham, to which he retired, that he might nourish his regrets. The unwearied friendship of the poet then prompted his exquisitely beautiful imitation of Horace's Ode to Venus:—<sup>3</sup>

"Again? new tumults in my breast?  
 Ah, spare me, Venus! let me, let me rest!  
 I am not now, alas! the man,  
 As in the gentle reign of my Queen Anne.  
 Ah sound no more thy soft alarms,  
 Nor circle sober fifty with thy charms,  
 Mother too fierce of dear desires,  
 Turn, turn to willing hearts your wanton fires;  
 To *number five* direct your doves,  
 There spread round MURRAY all your blooming loves;  
 Noble and young, who strikes the heart  
 With every sprightly, every decent part;  
 Equal the injured to defend,  
 To charm the mistress or to fix the friend;  
 He, with a hundred arts refined,  
 Shall stretch thy conquests over half the kind.  
 To him each rival shall submit,  
 Make but his riches equal to his wit.  
 Then shall thy form the marble grace,  
 Thy Grecian form, and Chloe lend the face;  
 His house, embosom'd in the grove,  
 Sacred to social life and social love,  
 Shall glitter o'er the pendent green,  
 Where Thames reflects the visionary scene:  
 Thither the silver sounding lyres  
 Shall call the smiling Loves and young desires;  
 There every Grace and Muse shall throng,  
 Exalt the dance, or animate the song;  
 There youths and nymphs, in consort gay,  
 Shall hail the rising, close the parting day."

The soothing effect of this rivalry of youths and nymphs, graces and muses, smiling loves and young desires, would have been very doubtful; but Murray was cured by the return of Michaelmas Term, which recalled him to Westminster Hall, and by the turmoil of attorneys and solicitors, jurymen and witnesses, noisy counsellors and prosing judges.

All his energies were soon after called forth by receiving a brief in a *crim. con.* cause of much expectation. The lady [DEC. 5.]

<sup>1</sup> Such discrepancy is there between Law and Poetry, that Pope himself cannot pay a compliment to a lawyer without giving a specimen of the bathos. These two lines were happily ridiculed in Colley Cibber's parody:—

"Persuasion tips his tongue whene'er he talks;  
 And he has chambers in the King's Bench walks."

<sup>2</sup> Odes, book iv. ode 1.

who was the subject of it, a sister of Dr. Arne the composer, possessed exquisite beauty and attractions. She was a favorite actress, and the whole town had been lately occupied with the notable dispute between her and Mrs. Clive as to which of them should perform the part of Polly Peachum in the Beggar's Opera. She had been married to the worthless son of the famous Colley Cibber: many stories were circulated of her gallantries, and from among her many lovers Colonel Sloper, the one selected as a defendant in this action, had a distinguished name in the fashionable world. Murray was only junior counsel for him; but in those days, when long speeches were unknown, all the counsel were permitted to address the jury, and he had a fair chance of an opportunity to show off his eloquence.

A story was fabricated, and has been repeated a hundred times, that he emerged from obscurity and made his fortune on this occasion by the accidental illness of his leader. Nay, we are circumstantially told that "on Serjeant Eyre's sudden seizure in court, when about to speak for the defendant, the duty of the senior devolved on the junior counsel, who, at first modestly declined it for want of time to study the case, and that the judge, to indulge him, adjourned the trial for about an hour."<sup>1</sup> Not only is this fit of poor Serjeant Eyre unnoticed by the contemporary accounts of the trial which were printed, but they actually give us his speech to the jury, which seems to have been "hot and heavy," as became the coif.<sup>2</sup> Mr. Murray followed, and was much more lively and impressive. In truth, it was a most infamous action, and now-a-days, on the maxim, "*volenti non fit injuria*," the plaintiff would have been nonsuited, for he had connived at his own dishonour; and it was proved that when Colonel Sloper and Mrs. Cibber were in bed together, he had brought them a pillow and put it under their heads. The Magazines<sup>3</sup> are rapturous in their praise of Mr. Murray's performance, but give us a very meagre account of it; and my readers, making allowance for bad reporting, must not conclude that it was feeble from the following extract, which is the most favorable I can find:

"The plaintiff tells his servant that 'Colonel Sloper is a *good natured boy*.' To this boy he resigns his wife, from this boy he takes money to maintain his family, and then he comes to a court of justice and to a jury of gentlemen for reparation in damages. It devolves on you gentlemen, to consider the consequences of giving damages in a case of this nature. Infinite mischiefs would ensue if it should once come to be understood in the world, that two artful people, being husband and wife, may lay a snare for the affections of an unwary young gentleman, take a sum of money from him, and then come to extort more with the assistance of twelve jurymen. I desire to be understood as by no means an advocate for the immoralities of my client; but remember, gentlemen, this is not a prosecution seeking punishment for the sake of the public; the only

<sup>1</sup> Holliday, p. 35.

<sup>2</sup> Legal conundrum:—"Why is a Serjeant's speech like a tailor's goose?" A. "Because it is *hot and heavy*!"

<sup>3</sup> Reporting law trials in newspapers did not begin till long after.

question here is, whether the plaintiff has been injured, and surely he cannot justly represent himself as injured if he has not only consented but received a high price for that which he does not at all value. However, gentlemen of the jury, if it be thought requisite to find a verdict for the plaintiff, we have not a denomination of coin small enough to measure the damages."

The jury found a verdict for the plaintiff, with 10*l.* damages, said to be "a piece of bank paper of the smallest value at that period in circulation."<sup>1</sup>

Mr. Murray's eloquence was the theme of universal applause; and, in spite of misapprehension and exaggeration, there can be no doubt that this speech, delivered in common professional routine, placed him at the head of the bar. He never countenanced the fable of Serjeant Eyre's fit, and knew well that he had reaped the fruit of premeditation and study; yet he used to talk of this trial with much complacency, and to say, "Henceforth business poured in upon me from all quarters, and from a few hundred pounds a year, I fortunately found myself in the receipt of thousands."

The most distinguished client who solicited his patronage was Sarah, Duchess of Marlborough, who had several important suits going on in the Court of Chancery respecting the trusts of her husband's will; and desirous of stimulating his zeal in her favor, she resolved to make him a liberal donation, although not quite so splendid a one as that received from her by his rival Pitt. She sent him a general retainer, with a thousand guineas. Of these he returned her nine hundred and ninety-five, with the intimation that "the professional fee, with a general retainer, could neither be less nor more than five guineas."

As might be expected, she was a very troublesome client, and she used to visit him herself at very unreasonable hours. On one occasion, when late at night he came home to his chambers, he found them almost blocked up by a splendid equipage; footmen and pages, with torches in their hands, standing around; and the Duchess seated in his consulting chair. Instead of making any apology, she thus addressed him: "Young man, if you mean to rise in the world, you must not sup out."

Another night, when after the conclusion of a very long trial in which he had succeeded, he was indulging in agreeable conversation with Pope and Bolingbroke, Sarah again called, and, having in vain expected his return till past midnight, went away without seeing him. His clerk, giving him an account of this visit next morning, said to him, "I could not make out, sir, who she was for she would not tell me her name; but she swore so dreadfully that she must be a lady of quality!"

Mr. Murray's growing celebrity procured him a retainer at the bar of the House of Commons as counsel for the merchants who, because they were interrupted in their smuggling adventures to the Spanish colonies, petitioned for a redress of imaginary grievances, and were trying, with-

<sup>1</sup> Holliday, 35; Selwyn's *Nisi Prius*, 10. Lord Kenyon, in *Duberly v. Gunning*, 4 Term Reports, 654, represents the verdict in *Cibber v. Sloper* to have been for the defendant; but he was quite mistaken.

out any sufficient ground, to bring about a war between the two countries. On this occasion "every resource of oratory was applied to exaggerate the insults and cruelties of the Spaniards, and to brand as cowardice the minister's wise and honorable love of peace. It was asserted that the prisoners taken from English merchant vessels had been not merely plundered of their property, but tortured in their persons, immured in dungeons, or compelled to work in the Spanish dockyards with scanty and loathsome food, their legs cramped with irons, and their bodies overrun with vermin."<sup>1</sup> To prove these outrages, Murray called as witnesses several captives and seamen; relying mainly on the famous Captain Jenkins, who stated that "a Spanish captain had torn off one of his ears, bidding him carry it to his King and tell his Majesty that if he were present he should be treated in the same manner;" and being asked what were his feelings when he found himself in the hands of such barbarians, answered (perhaps, on the suggestion of the counsel), "I recommended my soul to God, and my cause to my country." War was soon after proclaimed amidst public rejoicings, while Walpole prophesied truly, "They may ring their bells now; before long they will be wringing their hands."<sup>2</sup>

Murray, since his altered fortunes, could enter on a matrimonial negotiation with entire confidence. He proposed to the Lady Elizabeth Finch, a daughter of the Earl of Winchelsea; and on the 20th of November, 1738, he led her to the altar. Their union was most auspicious. They had no offspring, but they lived together happily for near half a century; and his passion for CHLOE was only remembered by him to illustrate the maxim which he inculcated, that a first love may be succeeded by a second as pure and as ardent.<sup>3</sup> Lady Mansfield, by the exemplary discharge of every domestic, social, and religious duty, made his home delightful till the 10th of April, 1784, when he resigned her in the hope of being speedily reunited to her in a better world.

The first four years after his marriage must have been the happiest portion of his existence. He was in the enviable situation of being at the head of the bar, without the anxiety or the envy which may be expected to attend the possession of office. Hope held out to him the most brilliant prospects of advancement, and, as yet, he thought there must be supreme felicity in gratified ambition.

Both parties in the state were eager to enlist him in their ranks. At this time there were very few professed Tories, and still fewer avowed Jacobites. Politicians struggling for power, almost all coming within the general denomination of Whigs, were divided into the adherents and

<sup>1</sup> Lord Mahon, ii. 242.

<sup>2</sup> Coxe's *Memoirs of Walpole*, i. 579—618.; Tindal, viii. 372.; *Commons' Journals*, March 16, 1738.

<sup>3</sup> Some of Lord Mansfield's biographers have supposed that the *Lady Elizabeth Finch* herself was the true CHLOE, and that, she remaining true, her family relented on the improved prospects of her lover, but not only from the verses of Pope, but from other sources, it is quite certain that CHLOE did wed the *rich dulness* of a Lincolnshire squire, and that the Lady Elizabeth succeeded her in the affections of her Strephon.



the enemies of Sir Robert Walpole. Murray warily refused to join either the one class or the other. He had been counsel in a Chancery cause for the Duke of Newcastle, who, eager to secure the rising lawyer as a partisan, wrote the following letter to Lord Chancellor Hardwicke:—

“I cannot but think myself greatly indebted to Mr. Murray, who, from the great pains he has taken in the way of his profession, has singly procured the consent of all parties, without which I should not have been thoroughly easy. I should be glad to make him any proper return; and as promotions in the law are now stirring, might I submit it to your Lordship whether Mr. Murray might not be made one of the King’s counsel? His ability nobody will doubt, and I will be answerable he shall do nothing unbecoming that station, or that shall reflect upon those who shall recommend him to it. Your know, my dear Lord, the reason I ask this favor of you, and for him; and you must therefore know how greatly I shall be obliged to you if it can be granted, and that is all I shall say upon the occasion.”

The Duke, however, in his peculiar fashion, annexed certain conditions to this favor, which were rejected, and Murray continued [A. D. 1742.] to lead the bar in a stuff gown till he was made Solicitor General. At last the veteran minister, after having for twenty years distributed the patronage of the Crown, was now so hard pressed that his fall was deemed inevitable; but there was no concert among his heterogeneous opponents to form a government to succeed him, and there would have been no prudence in joining any section of them. Murray pretended to be guided by the sentiment of Pope, that “the man who may have the good-will of all parties is guilty of folly if he becomes a partisan.” However, when the crash was over, and Pulteney, to the surprise of all mankind, declining to take office, [FEB.] the Duke of Newcastle, Pelham, and Hardwicke seemed firmly seated in power, the shrewd Scot did not hesitate to declare that he thought they were entitled to the support of enlightened statesmen. His own father-in-law, the Earl of Winchelsea, had become First Lord of the Admiralty, and was a member of the new Cabinet. His friendly opinion of Mr. Murray was made known in the proper quarter, and there was a warm desire to take him as soon as possible into the service of the Crown.

But he spurned the notion of any political appointment, and there was a difficulty in bringing about a vacancy in the office of Attorney or Solicitor General, as neither of the present law officers could be uncere- moniously removed, and the existing occupants of the chiefships in Westminster Hall seemed hale and hearty. In the course of a few months Sir John Strange, the Solicitor General, whose health had failed him, was induced contentedly to resign, on a promise of being made Master of the Rolls. Mr. Murray was installed as his successor, and immediately after was returned to the House of Commons, in his [Nov.] stead, for Boroughbridge, one of the many seats in the gift of the Duke of Newcastle.<sup>1</sup>

<sup>1</sup> At the same time he was elected a Bencher of Lincoln’s Inn:

“At a Council held the 29th day of November, 1742.

“Ordered,—That the Hon. William Murray, Esq., His Majesty’s Solicitor

The very honorable feelings which filled his mind on his promotion are well expressed in the following letter from him to Mr. Grant, an eminent advocate at the Scotch bar, who had lately been deprived of the office of Lord Advocate, but was afterwards made a Judge by the title of Lord Prestongrange :—

“Dear Sir,—Give me leave to acknowledge your very obliging letter; your partiality flatters me, extremely; because I am persuaded it proceeds from good will; and there is nothing I covet so much as the good will of those I value and esteem. The office I have accepted came unasked, and recommended by many circumstances to make it agreeable, else I cou’d have liked very well to continue as I was; my ambition is not so much to aspire to high things, as to act my part, whatever it is, as well as I can. In my way of thinking, I cannot condole with you upon the loss of that office to which you did honor while you filled it, tho’ I was heartily concerned when I heard of it; I cou’d condole with those who took it from you; the enjoyment of it cou’d not add much to your figure or character, the loss of it can take nothing from either; and I am convinced that in making the change no part of the motive was personal to you. It is to God and yourself that you owe being at the head of your profession, which, in my opinion, is the highest object of ambition. This situation no power can give or take away. That you may long enjoy it in spirits and health is the sincere wish of

“Dear sir,

“Your most ob: hu: servt.

“W. MURRAY.

“Lincoln’s Inn, 18th Dec. 1742.”

Before we see the new Solicitor tossed about on the stormy ocean of politics, on the margin of which he now stood, let us try to catch a glimpse of him in private life. He had taken a handsome house in Lincoln’s Inn Fields, then the haunt not only of prosperous lawyers but of ministers of state.<sup>1</sup> Here he received his professional friends, whom he entertained with elegant hospitality and genuine kindness. One of

General, be invited to the bench of this Society; and that Mr. Attorney General, and Mr. Browne, two of the Masters of the Bench, are desired to attend him with this order, and report his answer to the next Council; and if the said Mr. Murray do accept of this invitation, he is, according to the rules of this Society, to pay all his arrears and duties to the Treasurer of this Society before he be published to the Bench.”

“At a Council held the 15th day of December, 1742.

“Upon the Report of Mr. Attorney General, who, with Mr. Browne, was, by order of the last Council, desired to attend the Hon. William Murray, Esq., His Majesty’s Solicitor General, with an invitation to the Bench, that he, together with Mr. Browne, had attended the said Mr. Murray, who had accepted of the said invitation,—it is Ordered, that the said Mr. Murray be called to be a Bencher of this Society, and that he be published at the next Exercise in the Hall, he having paid all his arrears and duties to this Society.”

He was Treasurer the following year.

<sup>1</sup> The Duke of Newcastle’s house was at the north-west corner, next to Queen Street.

these whom he most loved was Mr. Booth, afterwards celebrated as a conveyancer, but at this time very much disheartened by the small success he met with in the department of the profession which he had chosen. The following letter, written to cheer and encourage him, shows Murray to have had a warmth of heart for which he has not had sufficient credit:—

“My dear Friend,—I received yours last night. I cannot but applaud the protection you give a sister, whom I know you love tenderly; yet it seems a little rash to carry your beneficence so far as to dry up the source of all future generosity; and I am sure it is greatly against the interest of every one, who has the least dependence upon you, that you should do anything which makes it all difficult for you to persevere in a way where you must at last succeed. Of this I have no doubt; and, therefore, it is as superfluous to add my advice for your coming to town immediately, as it would be to tell you that I omit no opportunity of mentioning your name, and promoting your interest. You cannot fail but by staying in the country, and suffering people who have not half your merit to step in before you. With regard to everything you say of Mr. Pigot, we will talk more at large hereafter; I as little think he will bring you into his business while he lives as that you can be kept out of a great part of it when he dies. I am at present consulted upon a devise-settlement of his, whereby a great estate is left to a noble Roman Catholic family—which I am very clear is good for nothing. Can you contrive a way by which an estate may be left to a Papist? Though I have no more doubt of the case put to me than whether the sun shines at noon, I told the gentleman who consulted me I would willingly stay to talk with a Roman Catholic conveyancer, whom I expected soon in town, and named you to him.

“I own I am desirous you should come to town; and be assured the best service you can do your friends is to put yourself in a way to serve them effectually. As to any present occasions you have, you know where to command when I have a shilling. *Nil mihi rescribas, attamen ipse veni.* I am, I do assure you, with great cordiality and esteem,

“Dear Booth,

“Your affectionate friend and faithful servant,

“W. MURRAY.”

To show his amiable disposition and recollection of favors received, I may here introduce two letters written by him to Lord Milton, a Judge of the Court of Session in Scotland, from whom he had received much kindness when a boy:—

“My dear Lord:—To come at once to the business of my letter, and without a preface. I have lately been engaged before my Lord Chancellor in a question for the Dean and Chapter of Christ Church College in Oxford, of which your Lordships knows I was, till very lately, a member. It was a point about which they were very anxious; and I happened to speak in it so much to their satisfaction that they have thought themselves obliged to make a particular acknowledgment of it and the manner in which they have done it is very well judged; they

have offered me the nomination of a student, who is there the same as a fellow of another college. There go four ev'ry year from Westminster School, and the other Vacancies are filled by the Dean and Canons. The thing is extremely creditable; and they may be upon a foot with any gentleman of the place at a much less expense. From the College they have chambers commons and about 20*l*. a year, which increases according to their standing. There are other advantages afterwards to those who reside there and take orders.

"I did not refuse the offer made of this nomination; and immediately resolved to propose it to my Lady Milton and you. My nephews are too young; and besides, I intend, if they are educated in this country, that they shall go thro' Westminster College. I find your Lordship has a son at Winchester School about sixteen years of age, but I fear he is your oldest son, and therefore it will not be of the same service to him that it wou'd be to a younger son. I am told that the next you do not intend for a learned profession, but for the army. However, it may be worth your while to consider whether you will accept of it for your eldest son; if you intend to breed him to a profession in this country, and to give him an university education. If you propose to send him to the University here for a year or two only, and then abroad to study the civil law, and travel, and so home, this certainly don't deserve to be thought of, and is by no means advisable; and I suspect this so much to be your plan, and it is a very reasonable one, that when I found upon enquiry you had no younger son whom this would suit, I doubted whether I shou'd propose this to you at all; but a friend of yours, from whom I learnt the state of your family, desired I wou'd that you might judge for yourself. There is no haste in determining, because it will be a considerable time before the place falls. I desire my compliments to my Lady. I need not tell you the pleasure it wou'd give me to be serviceable to your family in any respect. This is the first thing in my power that has offered, and, whether it suits or not, I have the pleasure of giving this small mark that I am, my Lord,

"Your Lord's most obliged and obedt. hu : servt

"W. MURRAY.

"Lincoln's Inn, 2d Feb." (1737-8)

"My dear Lord:—The accounts I have lately heard of your Lops health have given me great pain; and I have often been tempted to write to Lady Milton to enquire after you, but I was afraid it might be too tender a subject to apply to her upon. I called yesterday upon L<sup>d</sup> Isla to talk with him about your son's education. I am glad to find he thinks the offer which fortune put in my power to make you last year is so advantageous to him as not to leave room for deliberation; tho' he has some prejudices, and perhaps too well founded, to many things in our Universitys; I know the good and the bad of them very well; and upon the whole am very clear that you cannot dispose of him in any other way so well, and it will interfere with no scheme which you can have hereafter. I am too much pressed at present to give you my reasons, and I only write this to tell you that my L<sup>d</sup> and I agree he shou'd go to Christ



Church in Oxford. The time when, and everything else in relation to fixing him there, I will take the trouble of directing, and likewise recommend him to proper company, and put him under the best care I can. I desire my compliments to my lady, and am with great truth,

“Your Lop’s most ob : hu : servant

“W. MURRAY.

“Lincoln’s Inn, 11 Jan. 1738–9.

“I don’t at all know what progress he has made at school, but he seems to me a very pretty youth.”

The new Solicitor General and M. P. found a mortifying difficulty in keeping up the intercourse he wished with his literary associates ; and Pope when publishing a new edition of the DUNCIAD, introduced him (although with respect and tenderness) among those who from their classical attainments and their genius might have gained high intellectual distinction, but who had sunk into lawyers and politicians :—

“We ply the memory, we load the brain,  
Bind rebel wit, and double chain on chain ;  
Confine the thought to exercise the breath,  
And keep them in the pale of words till death.  
Whate’er the talents, or howe’er design’d,  
We hang one jingling padlock on the mind ;  
A poet the first day he dips his quill ;  
And what the last ?—a very poet still.  
Pity ! the charm works only in our wall,  
Lost—too soon lost—in yonder house or hall.  
There truant Wyndham ev’ry muse gave o’er ;  
There Talbot sank, and was a wit no more !  
*How sweet an Ovid, MURRAY, was our boast !*<sup>1</sup>  
How many Martials were in Pultney lost !”

Notwithstanding such lamentations, the intimacy between the two illustrious friends continued without abatement. Pope was often in the habit of spending his winter evenings in the library of Murray’s house in Lincoln’s Inn Fields.

It is related that on one occasion the rising lawyer, being called away to a consultation, put into the poet’s hand a volume of Latin Epitaphs, lately published by Dr. Friend, head master of Westminster, saying that they had been much read and admired. Pope, who, like other great men felt unnecessarily jealous of a supposed rival, was alarmed lest his own fame in epitaph writing, on which he particularly valued himself, should be dimmed ; and on Murray’s return showed him the following epigram :—

“*Friend ! for your epitaphs I’m grieved :  
Where still so much is said,  
One half will never be believed,  
The other never read.*”

<sup>1</sup> From this compliment, I suspect that the beauty of CHLOE or some other charmer, had been celebrated by MURRAY in verses which have not reached us.

It is rather surprising that Murray’s name is not introduced with Wyndham’s, St. John’s, and Marchmont’s, in the verses on Pope’s Grotto at Twickenham ; but perhaps it did not aptly fall into any couplet. On such considerations do the praises and censures bestowed by poets sometimes depend.

The old Westminster, although a little hurt that his preceptor should be so slighted, acknowledged that the lines were smart, and, with permission, took a copy of them. But next night, Pope having produced a Latin epitaph of his own composition, which he maintained to be equal to any of Friend's, Murray, detecting a false quantity in it, threw it in the fire, saying that "the finest of English poets, and he who had most embellished his own language, ought to write in no other." The distinction conferred on a young lawyer by such an intimacy is more to be envied than Chief Justiceships and Earldoms.

Pope, a few days before his death, when much debilitated in body, was, at his own desire, carried from Twickenham to dine with Murray in Lincoln's Inn Fields. The only other guests invited were Bolingbroke and Warburton. O for a Boswell to have given us their conversation! But, perhaps, it is better that their confidence has not been betrayed, for, amidst the gratification arising from their lively sallies, we might have found Bolingbroke scoffing at religion,—Warburton irreverently anathematizing all who differed with him on questions of criticism,—Pope vindicating himself from the charge of Roman Catholic bigotry by denying Divine revelation,—and Murray softening the misconduct of those who had been, or were in the service of the Pretender, by admitting that he himself had had a strong hankering after the doctrine of the divine right of kings.

Some expected that Murray, having been treated by Pope as a son, would have been named his heir; but he was himself amply satisfied with the proof of the continued regard he experienced in being appointed his executor, and being legatee of a marble bust of Homer by Bernini, and another of Sir Isaac Newton by Guelfi. He had received before, what he valued beyond all his possessions, a portrait of Betterton, the actor, drawn by Pope himself, who, it is well known, thought he was born to excel by the pencil as well as by the pen.

## CHAPTER XXXII.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE WAS MADE ATTORNEY GENERAL.

It has often happened that a lawyer, with great reputation at the bar, [A. D. 1742, 1743.] has lamentably failed on coming into the House of Commons; but Murray, as a parliamentary debater, was still more applauded than when pleading as an advocate. Now he reaped the reward of long years of study, by which he cultivated and perfected the high qualifications for oratory which he had received from nature. The first time he opened his mouth in the House of Commons he seems to have had the most brilliant success; and, during, the four-

teen years he remained a member of that assembly, as often as he mixed in the debate he was listened to with favor.

His chief antagonist was William Pitt, who had entered parliament two years before him, as member for Old Sarum, and had made himself most formidable by an uncompromising hostility to all the measures of the Government, and by an energy of declamation and a power of invective hitherto unexampled in the annals of English eloquence. The great patriot was already compared to a mighty torrent which, with irresistible fury, carries away before it every obstacle that it encounters, spreading consternation and ruin through the country which it overwhelms.

Murray, unless on some very rare occasions, was found to be his match. The mellifluous tones,—the conciliatory manner,—the elegant action,—the lucid reasoning,—the varied stores of knowledge,—the polished diction,—the alternate appeals to the understanding and the affections,—the constant self-control,—which distinguished the new aspirant, divided the suffrages of the public. Even the worshippers of Pitt admitted that Murray was justly entitled to the complimentary quotation from Denham, which his friends applied to him,—

“Though deep, yet clear; though gentle, yet not dull;  
Strong, without rage; without o’erflowing, full.”<sup>1</sup>

The subject of agitation then was the taking of 16,000 Hanoverian troops into British pay. Pitt, heading the discontented Whigs, and backed by the Tories and Jacobites, denounced this act as illegal, unconstitutional, a sacrifice of British to Electoral interests, and a prelude to the introduction of despotism into this country,—and he brought forward a motion for an address to the Crown, [DEC. 6.] praying that these troops should be dismissed.

The duty of the Solicitor General of that day in the House of Commons was not confined to answering a legal question, or introducing a bill to reform the practice of the courts. The brunt of this debate chiefly fell upon him. From defective reporting, we can form a very inadequate notion of his speech; but I will give a few extracts from it. Thus he began:—

“Sir, the motion now under our consideration is of such a new and extraordinary nature, and is such a direct attack on the just prerogative of the Crown, that I should think myself very little deserving of the honor which his Majesty has been pleased to confer upon me if I did not rise to oppose it. There are certain powers vested in the King, as there are certain privileges belonging to the people, and an infringement of either would lead to the overthrow of our happy constitution. As the guardians of the liberties of the people, we are bound to respect the royal prerogative. But if there be anything certain it is this,—that to the King alone it belongs not only to declare war, but to determine how

<sup>1</sup> Perhaps the reader may be more amused by the description of his eloquence by his principal biographer,—“He was *perspicuous* without *constraint*, *mellifluous* without *exuberance*, and *convincing* without *ostentation*”—(Holliday, p. 54.),—although one does not see at first sight how the vice of which he is acquitted, is an excess of the good quality of which he is praised.

the war, when declared, shall be carried on. He is to direct what forces are to be raised; when armies are to march; when squadrons are to sail; when his commanders are to act, and when they are to keep upon the defensive. If this motion were carried, I should expect to see a venerable member moving an address that a general engagement shall be immediately ordered in Flanders, although the mover has never been out of England, 'nor the division of a battle knows more than a spinster.'" He then takes an enlarged view of the state of Europe, and particularly of the affairs of the Queen of Hungary; and, having shown that the most effectual mode of assisting her, and of baffling the attempts of France, was to send an army into Flanders, thus continues:—"On every side the most happy effects have been produced by the method his Majesty has chosen for assisting the Queen of Hungary. I hope it will not be said that we ought to assist her with our own troops alone. To raise by recruiting at home the army which would be necessary, must be injurious to our industry and injurious to our constitution. We must therefore have foreign troops in our pay, and where shall we find any to be preferred to the Hanoverians?" He next goes on to vindicate his Majesty's countrymen from the false charges of cowardice and insubordination, which, to spite him, were circulated against them; and to show that no improper partiality had ever been shown for them in preference to British troops. Thus he concludes;—"I will not say, sir, that upon no occasion would this House interfere with its advice as to the exercise of the prerogatives of the Crown. If wicked or incapable ministers were bringing disgrace on the British arms, degrading the national honor, and hazarding the national safety, we might be called upon to advise the King to change his measures and his advisers. But our allies have been effectually protected, and the interests of England, in every part of the world, have been vindicated. It is insinuated, indeed, that all our measures are secretly calculated for the benefit of the Electorate of Hanover. This is an insinuation of a most dangerous nature, and it ought not to be resorted to for mere party purposes, because it tends not only to wean the affections of the people from the sovereign on the throne, but from the Protestant succession in the Hanover line, and to bring about a counter-revolution which would be fatal to religion and liberty. Whether the republican faction, or Jacobitish faction, which are now united, shall prevail when the split comes, destruction alike awaits constitutional freedom. What ground is there for the charge? I do not pretend to be in the secrets of the Cabinet, and I am unable to dive into the hidden recesses of the human mind to analyze the true motives of action; but when the measures of the Government are wisely calculated to promote the dignity and prosperity of England, and have actually produced the happy results which might have been expected from them, why should you say that their hidden and sole object is to enrich Hanover and to add a few patches to its territory?"

The motion was negatived by a majority of 231 to 181, and Murray [A. D. 1743-1744.] became a special favorite with George II., who highly valued his services,—although he sometimes be-



lied him to be a convert from Jacobitism, and sometimes suspected his sincerity.<sup>1</sup>

The office of Attorney General was held by Sir Dudley Ryder, a sensible man and a good lawyer, but unfit for anything beyond the limits of professional duty; while Mr. Solicitor General Murray might henceforth be considered the Government leader in the House of Commons. For this office he had the very convenient privilege of professing, when it suited his purpose, entire ignorance of ministerial secrets. Without being formally a member of the Cabinet, it is quite clear that he was a party to its most important deliberations and decisions. Yet he would thus begin a speech on the policy of entering into a treaty with a continental state to prosecute the war:—"The post in which I have the honor to serve his Majesty has no concern with foreign affairs; and as I am not so unreasonable as to expect, much less desire, that ministers should communicate to me those secrets which the duty of their office requires them to conceal, I can know nothing of foreign affairs beyond what I learn from the public gazettes or papers laid before this House and accessible to every member. I know enough, nevertheless, to enable me confidently to oppose this motion, and easily to show its inexpediency." He then took a masterly view of the diplomatic relations of this country with the different courts of Europe, speaking hypothetically where direct assertion was incommodious.<sup>2</sup>

Nay, the Government actually depended upon him for vindicating the manner in which the war was conducted by England and her allies, and for meeting such questions as whether the allied powers could best make an impression on France by mustering their forces in Flanders or on the Rhine.<sup>3</sup> But these discussions, which, while they were going on, were declared, and perhaps believed, to be the most important which had ever occurred in the annals of Great Britain, led to no memorable result, and have now lost all their interest.

The connexion between England and the electorate of Hanover, which was the great topic of patriotic declamation and ground of popular discontent, has fortunately for ever ceased by the auspicious operation of the law of descent. The supposed grievances arising from this connexion were powerfully urged by Pitt and Littleton, who at last actually brought forward a resolution "that no prince holding foreign dominions should be qualified to fill the throne of Great Britain;" intimating that Hanover might be transferred to a younger branch of the House of Brunswick,—if the King, from his extreme and notorious partiality for it, should not choose it for himself.

Murray, in answer, dwelt on the impolicy of proposing a measure which we had no means of carrying; for if it met the approbation of the Parliament of England, it might be rejected by the Diet of the Germanic Empire. He conjured all lovers of constitutional freedom to rest satisfied with the *Act of Settlement*, which contemplated the possession of foreign dominions by the prince called to the British throne, and, recognizing

<sup>1</sup> 13 Parl. Hist. 143, 246, 274.

<sup>2</sup> Ibid. 143, 246, 384, 407.

<sup>3</sup> Ibid. 396.

this arrangement, anxiously and effectually guarded against all the inconveniences which it might by possibility occasion. He then tried to show that the complaints made on this subject by Tory fox-hunters and discontented aspirants to place, were to be ascribed to prejudice or calumny. Pitt thus began his reply:—"Not all the sophistry of the honorable and learned gentleman shall make me recede from the true point in debate, which is not at all affected by any one of his arguments."<sup>1</sup> But we shall find passages of arms between these champions more worthy of our regard.

We approach the rebellion of 1745, which ever must be interesting to the inhabitants of this island. An event had very nearly [A. D. 1745.] taken place which would have entirely changed our destiny, and might have had a material influence upon the history of Europe—the restoration of the Stuarts to the throne of their ancestors.

Murray must have viewed the struggle with divided feelings. He had cast in his lot with the new dynasty; but his second brother, whom he dearly loved, had been twenty years in the service of the Pretender, had been created by him Earl of Dunbar, and was supposed to be his destined prime minister. Whether or not Mr. Solicitor himself had ever drunk on his knees to "the King over the water," all his early associations must have led him to doubt the title of the reigning family; and, if the will of the people were to prevail, he saw the church and landed aristocracy in favor of a restoration, while the middle and lower orders testified perfect indifference as to the success of the old dynasty or the new.<sup>2</sup>

Whichever way he might be drawn by his inclination, he was governed by a sense of duty; and, remembering the oaths he had sworn, he strictly preserved his allegiance to King George, and used his best endeavors to frustrate the hopes of the Jacobites.

A message being brought down from the King, announcing the meditated attempt by Prince Charles Edward, the Solicitor General zealously supported the bill for suspending the Habeas Corpus Act, against George Grenville, who, though a sober-minded man, and well affected to the *Protestant succession*, was so far blinded by faction as to assert that "the threatened invasion was a mere contrivance of ministers to prolong their own rule." Murray made a very temperate and effective speech, showing that, since the Revolution, the same power had been asked by successive governments nine times over, and that on none of those occasions did there exist such a strong necessity for empowering the government to arrest and detain those who were well known to be guilty of treason, although there might not be legal evidence upon which they could be brought to an immediate trial.<sup>3</sup>

It would have been curious to read a diary sincerely written by him, from the time when news arrived of the landing of the young Pretender in Moidart till news arrived of his flight after the battle of Culloden.

<sup>1</sup> 13 Parl. Hist. 467—474.

<sup>2</sup> According to old Horace Walpole, they cried, "Fight dog, fight bear."

<sup>3</sup> 13 Parl. Hist. 671.

Murray's correspondence with his mother during the same period would be still more curious; for the good old lady, who never in all her life prayed for King George, made no secret of her good wishes for King James, and was said actually to have assisted the [A. D. 1746.] rebels with provisions as they passed through Perth. But no such stores of private information are open to us. Even in public records Murray's name is not mentioned till the Georgian cause had completely triumphed; and the "rebel Lords,"—who, if they had succeeded in their enterprise, being made Dukes and Knights of the Garter, would have been celebrated for their loyalty in all succeeding ages,—were to be prosecuted for joining in an unnatural rebellion; were to receive sentence to be hanged, beheaded, and quartered; and were to die with the reflection that their estates and titles were forfeited, and that their children were reduced to beggary and disgrace.

It must have been a painful task for Murray to take an active part in these prosecutions, for the prisoners were connected with his family by blood or alliance; but he did his duty with firmness and moderation, neither seeking to blunt the edge of the law out of favor to the accused, nor to make it cut with undue sharpness that he might avoid the charge of partiality.

Lords Kilmarnock, Cromarty, and Balmerino being tried before the House of Peers and a Lord High Steward, on bills of indictment against them found by an English grand jury for overt acts of treason committed in the siege of Carlisle, he appeared against them as one of the counsel for the Crown. With the first two he had little trouble, for they both pleaded GUILTY and prayed for mercy. Lord Balmerino pleaded NOT GUILTY, and relied upon two objections:—1. "That in the indictment he was designated 'John, Lord Balmerino, late of the city of Carlisle, in the county of Cumberland,' whereas his true title was 'John, Lord Balmerino, of Balmerino, in the county of Fife;'" and 2. "That he was indicted for the taking of his Majesty's city of Carlisle on the 11th of November, in the year of our Lord 1745; whereas he could prove that during the whole of that day he was at least twenty miles off, and the city of Carlisle did not surrender till two days after." Lloyd and Skinner, King's Serjeants, and Ryder, the Attorney General, argued at great length against these objections, showing that the words "late of Carlisle" did not mean to give the prisoner's title of dignity, but were only to satisfy a form of law, as denoting the place in which he had been; and that, by the rules of criminal procedure in England, though very strict upon some points, the offence might be alleged to have been committed on one day and proved by the evidence to have been committed on any other. The objections being still seemingly relied upon, the Solicitor General rose in his turn; but no sooner had he uttered the introductory words "My Lords," than Lord Balmerino, interposing, observed that "he was satisfied," and asked their Lordships' pardon for taking up so much of their time:—

*Solicitor General:* "My Lords, I was going to have said I did not apprehend it necessary for me to speak from any difficulty in the objec-

tions; but as the answer to them depended not on natural but on legal reasoning, and established forms, I would, for his satisfaction, as he has not the assistance of counsel, have said a word or two, not merely to prove the rules we contend for to be settled by the uniform authority of all our books and many adjudged cases, but to have explained why they have been so settled, that the prisoner may be described in conformity to the statute of additions, as *late of any place* where he has recently been, although he is not domiciled there; and that the treason must be laid in the indictment to have been committed on a particular day, although proof of its having been committed on another day is sufficient. As he has declared himself satisfied, there is no occasion to say more."

Mr. Solitor's intentions were praiseworthy; but it was rather lucky for him that he was released from the task he had undertaken, as these rules of law, however well established, certainly are very absurd and inexplicable; and he himself used to laugh at the ridiculous length to which lawyers were in the habit of carrying Coke's favorite maxim, "*Lex plus laudatur, quando ratione probatur.*"

The fate of these noblemen excited deep commiseration, notwithstanding the admission which all who reasoned coolly were obliged to make, that, for the stability of government and the peace of society, unsuccessful rebellion must be treated as a capital crime, and when Balmerino, [A. D. 1747.] on the scaffold, as a response to the prayer "God bless King George!" exclaimed "God bless King James!" he was regarded with reverence as a martyr.

In the next prosecution in which Murray was engaged, whatever private compunction he might have felt, he had not to encounter any merciful prejudices, and he was only an instrument in directing public vengeance against a man who, after a long career of treachery and rapine, wished to save the miserable remnant of his days by the sacrifice of his own son:—

"But Lovat's fate exultingly we view,  
True to no king, to no religion true:  
No Tory pities, thinking what he was;  
No Whig compassions, for he left the cause:  
The brave regret not, for he was not brave;  
The honest mourn not, knowing him a knave."

In this case Murray appeared not as a law officer of the Crown, but as a member of the House of Commons. The wily old chief- [MARCH.] tain, although, when he thought Prince Charles was about to succeed, he ordered his son and his clan to join his standard, had himself continued shut up in his castle in Inverness-shire. Therefore he could not be proceeded against by the presentment of an English grand jury; and, as the law then stood, he could only be brought to trial by impeachment. The Solicitor General was appointed one of the managers to conduct the prosecution at the bar of the House of Lords in the name of all the commons of Great Britain, and it was allowed on all hands that he performed this delicate duty with ability and good taste.

On the sixth day of the trial being called upon to reply, he began by



alluding to the disadvantage under which the octogenarian Peer seemed to labor from being obliged to rely upon his own advocacy ; but said,—

“Under the peculiar circumstances of this case, the assignment of counsel to the prisoner would rather have aided the prosecution. I speak it feelingly ; I would rather have been opposed to the ablest advocate than do what is now required of me as a faithful representative of the people. I am persuaded, my Lords, that compassion, inseparable from noble minds, has been ingenious to suggest to you doubts and objections in favor of one standing in that place, who certainly labors under some infirmities, and is allowed to defend himself by no other tongue than his own. If scruples have arisen in the minds of your Lordships, they will gain strength from that consideration, and the honest prejudice in his favor may be of more service than the most brilliant eloquence. But what can avail against acts of treason so irrefragably proved ? against the confessions and the boasts of the prisoner himself when he thought that the cause in which he had engaged was to be triumphant ?”

Mr. Solicitor then in a most lucid manner analysed the charges against the prisoner, and the proofs by which they were substantiated,—abstaining from all violence of declamation, but giving full effect to the salient points of the case, and, in a seemingly simple narration of facts, making the prisoner’s duplicity and violence rouse a strong spirit of indignation in the breast of the hearers. He thus delicately touched upon the insinuation that the march of the Frasers with the Pretender was to be ascribed solely to the “Master of Lovat :”—

“He laments the absence of his witnesses ; but there is no calling witnesses without facts ; there is no making a defence without innocence ; there is no answering evidence which is true. I will do him the justice to believe that, if he *could* with *truth*, he *would not* now throw the whole blame upon the ‘stiff-necked, headstrong disobedience of his son.’ That unhappy boy is already attainted, and is now actually in custody. Though he might have been made the scape-goat if he were out of reach ; yet, in his present situation, I am sure the noble lord would not seek to save his own life by representing his son as the real criminal.”

At the conclusion of this speech, Lord Talbot, the son of Lord Chancellor Talbot, said, “My Lords, the abilities of the learned manager, who just now spoke, never appeared with greater splendor than at this very hour, when his candor and humanity have been so conspicuous that I hope one day to see him add lustre to the first civil employment in this kingdom.”

The House then adjourned for a few minutes, that the Peers might take some refreshment. Lord Lovat seized this opportunity of introducing himself to the Solicitor General, who stood near him at the bar ; and, having complimented him on his able speech, added—“But I do not know what the good lady your mother will say to it, for she was very kind to my clan as we marched through Perth to join the Pretender.”<sup>1</sup>

<sup>1</sup> Horace Walpole most grossly misrepresents this anecdote, by transferring it to the trial of Lord Balmerino, and by supposing that the Solicitor General, who

The House being resumed, the prisoner made a very irregular proposal, that the trial should then be postponed to enable him to bring witnesses from Scotland,—but this was strenuously opposed by the Solicitor General and rejected. All the Peers present joined in a unanimous verdict of GUILTY.

When the prisoner was asked if he could show any cause why sentence of death should not be passed upon him, he said—

“My Lords,—I am very sorry I gave your Lordships so much trouble in my trial, and I give you a million of thanks for your being so good in your patience and attendance while it lasted. I thought myself much loaded by one Mr. Murray,<sup>1</sup> who, your Lordships know, was the bitterest witness there was against me. I have since suffered by another Mr. Murray, who, I must say with pleasure, is an honor to his country, and whose eloquence and learning are much beyond what is to be expressed by an ignorant man like me. I heard him with pleasure, though it was against me. I have the honor to be his relation, though perhaps he neither knows it nor values it. I wish that his being born in the north may not hinder him from the preferment that his merit entitles him to. Till that gentleman spoke, your Lordships were inclined to grant my earnest request, and allow me further time to bring up witnesses to prove my innocence; but, it seems, that has been overruled. All now that I have to say is a little in vindication of my own character.”

Having spoken at great length to justify himself from the charges of dishonorable conduct brought against him, he concluded with the following unexpected and good-humored observation: “I beg your Lordship’s pardon for this long and rude discourse. I had great need of my cousin Murray’s eloquence for half an hour, and then it would have been more agreeable.”

The old Peer, though really very worthless, acted his part so well at the final close of his career, as almost to make us forget his crimes, and to persuade us that he was a true patriot. In the night before his execution, after expressing deep abhorrence of Murray of Broughton, the Pretender’s secretary, who had turned king’s evidence, he again spoke kindly of his cousin William Murray,—saying, “Mr. Solicitor is

had excited suspicion of his loyalty by his courtesy to all the rebels, had brutally insulted them. “While the Lords were withdrawn, the Solicitor General Murray (brother of the Pretender’s minister) officiously and insolently went up to Lord Balmerino and asked him ‘how he could give the Lords so much trouble?’” Balmerino asked the bystanders who this person was? and being told, he said, ‘Oh, Mr. Murray, I am extremely glad to see you; I have been with several of your relations; the good lady, your mother, was of great use to us at Perth.’—*Letter to Sir H. Mann.*

Lovat’s tone of jocularly was preserved during the whole course of the trial. Old Sir Edward Fawkener, who had recently married a girl from a boarding school, having proved, in answer to some questions from the Solicitor General, that the prisoner had confessed the part he had taken in the rebellion, he exclaimed, “I have nothing to ask by way of cross-examination;—only my service to Sir Edward, and I WISH HIM JOY OF HIS YOUNG BRIDE.”

<sup>1</sup> Murray of Broughton, who had been Secretary to the Pretender, and turned king’s-evidence.

a great man, and he will meet with high promotion *if he is not too far north.*" Next morning he laid his head upon the block, exclaiming, "Dulce et decorum est pro patriâ mori."<sup>1</sup>

After these state trials were over, a period of internal tranquillity followed; and Murray, while he remained at the bar, had no opportunity of increasing his forensic reputation. He was easily the first counsel in the Court of Chancery; but in those days Equity proceedings attracted no degree of public notice. There were levelled against him various scurrilous articles in the newspapers, written by disappointed and envious rivals, representing him as an intruder in England, and containing many illiberal reflections on his native country. In his defence a pamphlet was published, entitled "*THE THISTLE*," with the motto "*NEMO ME IMPUNE LACESSIT*." This was imputed to himself, but must have been written by some very indiscreet friend, as may be seen from the following quotation on the state of the English bar:—

"Had it not been for the few Scotch there, particularly *two gentlemen* of that nation [Mr. Murray and Mr. Hume Campbell], who support oratory as far as the stated jargon and limited pedantry of the bar will permit, standers-by would be puzzled to know what was intended by the pleadings there. But these gentlemen, no less conspicuous for knowledge and virtue than for politeness of manners and a noble extraction, have gone great lengths the few years they have honored the bar with their attendance, not only to have reformed its language, but to instruct their fellow-barristers in the methods, forms, and connections of an argument, of which the English generally are most shamefully destitute. Even the furred *noddies* on the bench have benefitted by listening to the orderly and nervous discourses of these young Scottish pleaders. Yet are they become the envy of both Bench and Bar; of the latter, because they outshine all that fill it; and of the former, because they are independent, and do daily instruct those who sit upon it. Hence, and because you dread a reformation in the modern scandalous practice of the profession should an upright discerning Scotch lawyer come to preside on the bench, is one of those distinguished Scotch barristers become the object of your obloquy and virulence, although he is no less an ornament to the English senate and bar than to his family and country."

But his progress could not be diverted either by malevolent vituperation or by absurd eulogy. For some years afterwards he was chiefly distinguished as a parliamentary leader. From the rigorous enforcement of the standing order against the publication of debates, we have hardly any fragments of his eloquence,—but memoir writers inform us of the occasions when he came forward with most effect. He ably carried through the House of Commons the bill for abolishing hereditary jurisdictions in Scotland, and the other measures devised by Lord Hardwicke for the tranquillity and civilization of the Highlands. Beyond the common routine of official duty, he opposed, with spirit, although without effect, a bill introduced into the House of Commons to forbid the insurance of enemies' ships in time of war. The ultra-free-trade princi-

ples which he then advocated would appear very startling even at the present day, and, indeed, would furnish a defence of the Dutch doctrine, that a besieged city should sell gunpowder and balls to the besieging army. Considering that, if enemies' ships are insured by British underwriters, there is a strong temptation to communicate intelligence to the owners of the sailing of British cruisers; and that, upon a capture, there is an indemnity to the enemy from British capital,—independent of any [A. D. 1748.] technical objections from the illegality of a contract with an alien enemy,—there seems rational ground for prohibiting such policies of insurance. But Mr. Solicitor General Murray delivered a very long and ingenious speech in defence of them. The first part of it, in which he inveighed against the narrow-minded views which had guided English commercial legislation, is admirable. He is particularly severe upon the monstrous injustice and impolicy of the acts by which the Irish were prevented from importing their corn and cattle into England,—and, when they were establishing manufactures of their own, were prevented from exporting their manufactured goods to any foreign country where they might rival those of England. Having shown the high profits derived by us from the business of insurance, he thus proceeded:—

“It is well known that there is not a more enterprising, adventurous people in Europe than the French naturally are, nor a people who have a greater itch for everything that looks like gaming. Their having no public insurance office nor any number of private insurers in France does not proceed from want of rich men who would be ready and willing to undertake this business, but from the difficulty they find at present to get any custom in this line. The French merchants have been so long used to our shop, and have always found themselves so honorably dealt with here, that they will not voluntarily go elsewhere. Let things remain as they are, and it will never be in the power even of the government of France to set up a public insurance office, nor can any private man there become an underwriter with any hope of success. But this bill being passed, insurance offices will be established in Paris, Nantes, and Bordeaux, in which French ships will be insured not only in time of war but in time of peace; and not French ships only, but the ships of all other foreign nations. Thus, sir, we are to strip ourselves of a most valuable branch of trade, and to transfer it to the French that they may become more wealthy in peace and more formidable in war.”<sup>1</sup>

When the inglorious contest in which we had been for some years engaged was at last brought to a close, the task of defending the [Nov.] treaty of Aix-la-Chapelle in the House of Commons devolved upon the Solicitor General. It was first canvassed in the debate on the [A. D. 1748, 1749.] King's speech announcing that it had been concluded, before a copy of it had been laid upon the table of the House. In answer to the attack led on by Mr. Nugent, who moved a vote of censure, Murray said, “I know nothing of the late treaty which the honorable member has so violently attacked, except

<sup>1</sup> Holliday, 90—97; 24 Parl. Hist. 108—133.



from the public newspapers; but if the articles be such as they represent, the peace is more advantageous for us than under the circumstances could have been expected, and the marvel is that the French were induced to agree to it." He then goes over the articles *seriatim* such as they were "*rumored* to be;"—showing that, in reality, he must have had a considerable hand in *negotiating* them. The topic he chiefly dwelt upon was the danger to which the Dutch would have been exposed if hostilities had been continued; and, this having been ridiculed by his opponent, he indignantly observed:—

"Danger, sir, has always a very different effect upon the imagination of those who are near and those who are at a distance from it. The former view it through the right, the latter through the wrong end of a telescope. Gentlemen of England, who sit here at their ease, may think that the Dutch might have trusted to their dykes, and defied the whole military power of France; but when we talk of the necessity of making peace, we must consider in what light the Dutch themselves viewed the perils by which they were environed. Suppose (for, as I have no knowledge of the fact, I can only suppose) them to have been so much alarmed that they would have agreed to a neutrality if we had refused the offered terms of conciliation. Their troops being withdrawn, our army would have been much inferior to that of France, and our national honor might have been put to hazard. The French court must have been sensible of that which seems to have escaped the acuteness of honorable members opposite, and therefore, I again say, we may well wonder that the terms of peace are so favorable."<sup>1</sup>

For some sessions after this, Murray led a quiet life in the House of Commons, for Pitt was in office; and, although there never existed any cordiality between them, while they remained colleagues there was a suspension of open hostilities. In the debate on the Bavarian subsidy they both spoke at great length,—to the astonishment of the House, on the same side; and as the *defensive* was not the field in which the great patriot was qualified to shine, although he was so tremendously formidable as an assailant,—the silver-tongued lawyer will be found on this occasion much more dexterous and efficient in explaining the questions which then agitated the German Empire, and proving that it was for the advantage of England to induce Bavaria to take part with Austria against France.<sup>2</sup>

An unexpected event soon after occurred, which disturbed party connexions and changed the history of the country— [MARCH 20, 1751.] the death of the Prince of Wales. He was not much distinguished for prudence or steadiness; but all who had been disappointed in their hopes of advancement were inclined to speak favorably of his openness of manner and warmth of heart, and the reign of Frederic I., while dreaded by some, had been looked forward to by many with impatience.

The reigning Sovereign being turned of seventy, and the youth who was now heir apparent being of tender years, it became necessary, in

<sup>1</sup> 14 Parl. Hist. 331.

<sup>2</sup> Ibid. 930—970.

case of a demise of the Crown, to provide for the exercise of the royal authority by a Regent. George II. wished to appoint his favorite son, the Duke of Cumberland,—styled alternately the “Hero of Culloden” and the “Butcher;” and the people demanded the Princess Dowager of Wales, insinuating that an infant sovereign would be safer under the guardianship of his mother than of his uncle.<sup>1</sup> By way of compromise, a bill was brought in to constitute the Princess Regent—with a Council of which the Duke of Cumberland was to be President. Murray had the drawing of this bill, and the conduct of it through the House of Commons. His speech in support of it forcibly pointed out the defect in our constitution by which the next heir coming to the throne, although a baby incapable of uttering an articulate sound, is supposed to be of full age, and instruments passing under the great seal in his name have the same validity as if he had actually approved and sanctioned them, being of mature years,—so that the person who can get the baby monarch into his custody may first usurp supreme power as Protector, and then attempt to make himself the head of a new dynasty—as was done by the Duke of Gloucester, afterwards Richard III.; pointed out the impossibility of a general law to provide for carrying on the executive government during the minority or disability of the Sovereign; and dwelt upon the wisdom of going no further for the present than enacting the course to be pursued if his Majesty should be called away before his grandson, Prince George, had reached the age of eighteen. He proved, easily enough, that the Princess Dowager was the fittest person to be named for Regent; but he ineffectually tried to enforce the point that she ought to be controlled by a Council—the constitutional notion being that, with a few exceptions to protect the established religion and the succession to the throne, a Regent ought to exercise all the royal prerogatives under ministerial responsibility. In this courtier-like fashion did he try to struggle with the difficulty:—

“I have so firm, so well-grounded an opinion of the many good qualities of the Princess, that I am convinced our investing her with sovereign power would be attended with happiness, and perhaps glory, to the nation; but for this very reason I am against it: the precedent would have such weight, that a future parliament could not depart from it, however strong the reasons might be for following a different course; and, as this might be of dangerous consequence to her posterity, I am prevented from evincing the regard which is due to her extraordinary endowments.”<sup>2</sup>

The bill passed; but George II. survived till his grandson was able to say from the throne that “*he gloried in the name of Briton.*”

Murray had managed this matter with such dexterity that he seemed hardly liable to the political vicissitudes by which hopes of official stability of promotion are sometimes dashed, and he himself thought he

<sup>1</sup> “I fear no uncles dead,” was a common quotation, although the Duke of Cumberland was a very honorable and, upon the whole, a very respectable character.

<sup>2</sup> 14 Parl. Hist. 1033.

was equally secure under King or Regent,—when, in a clear sky, a storm arose which very nearly overwhelmed him.—He was charged with being an adherent of the Pretender.

The scrape in which he so unexpectedly found himself involved occasioned infinite annoyance and vexation to him, and he did not get out of it with entire credit.

When at Westminster School, his most intimate associates were four boys in the same form with himself; Fawcet, Johnson, Stone, and Vernon. The father of the last, although a draper in Cheapside, was of ancient blood, and had embraced trade when a younger brother. The family estate descended upon him, but it was considerably reduced, and he continued to vend his wares as before. Like most of the landed aristocracy, he was a furious Jacobite,—making no secret of his political propensities. Young Vernon was in the habit of taking Murray, Fawcet, Johnson, and Stone to his father's house on holidays; and there they most unquestionably must have heard much Jacobitism talked, whatever else may have happened. Old Vernon was very kind to them, and took particularly to Murray—being charmed with his good looks, his vivacity, and his agreeable conversation, as well as prejudiced in his favor by his noble birth and his *true blue* connexions. The five young friends, although carried away in different directions by the accidents of life still kept up a correspondence by letter, and occasionally met together at supper at the Jacobite draper's in Cheapside after Mr. Murray had been called to the bar. Young Vernon embraced the same profession, but, from ill health, had been unable to prosecute it. Fawcet had settled as a provincial barrister at Newcastle, and had become Recorder of that town. Johnson had taken orders, and was an assistant master of Westminster School. Stone, who was a remarkably fine classical scholar, was dedicating himself to literature, and hoped by his pen to rise to be a Prebendary, or a Commissioner of Customs. In the course of a year or two, young Vernon died,—but Murray continued a friendly intercourse with the father, who, being childless, threw out hints that he meant to adopt him as a son, and actually left him by will his family estate in the counties of Chester and Derby, which still belongs to the Mansfield-Murrays.

After the death of Frederick Prince of Wales, Fawcet remaining Recorder of Newcastle, Johnson, by Murray's interest, from being a Prebendary of Durham was promoted to the see of Gloucester. Stone having been some time private secretary to the Duke of Newcastle, had been appointed sub-governor or preceptor to Prince George.

It happened that at the dinner-table of the Dean of Durham the conversation turned upon Johnson's late elevation, and the interesting question arose, *who was to have his prebend?* [JAN. 1753.] The Dean said, "The last news from London is, that Dr. Johnson is to keep it." Fawcet, who was one of the party, observed, "I am glad Johnson gets on so well, for I remember him a Jacobite several years ago, when he used to be with a relation of his, who was very disaffected, —one Vernon, a mercer,—where they frequently drank the Pretender's

health." The imprudent Recorder, elevated by wine and gnawed by envy, gave further particulars of those *love feasts*, and introduced the names of Murray, the Solicitor General, who had gained such *eclat* by prosecuting the rebel Lords, and of Stone, now intrusted to conduct the studies and to form the principles of the Heir-Apparent to the throne.

Among the guests present was the foolish old Lord Ravensworth. He most officiously, and in breach of the implied confidence which forms the charm of social intercourse, posted off to London, and communicated this conversation to Mr. Pelham. The Prime Minister listened to the tale with much distaste, but felt it his duty to repeat it to the King. With admirable good sense, his Majesty exclaimed, "It is of very little importance to me what the parties accused may have said, or done, or thought, while they were little more than boys: I am quite satisfied with the assurance that they have since become, and now are, my very faithful subjects and trusty servants."

But the matter was seriously taken up by the opponents of the Government; and a petition to the King, numerously signed, praying for investigation, contained the following passage:—"That to have a Scotchman of a most disaffected family, and allied in the nearest manner to the Pretender's first minister,<sup>1</sup> consulted on the education of the Prince of Wales, and intrusted with the most important secrets of Government, must tend to alarm and disgust the friends of the present royal family, and to encourage the hopes and attempts of the Jacobites."

It was resolved that *the accusation deserved no further notice*; and Murray, who had been made very uneasy by the rumor about him which had got afloat, believed that the matter was at an end. But Stone posterously insisted on a solemn inquiry; and the charge against him, Murray, and Johnson was referred by the King to the Privy Council.

Murray, strongly protesting his innocence, at first said he would resign [FEB. 15.] his office sooner than submit to such a degrading examination, but was afterwards persuaded by his friends to appear and make his defence along with Johnson and Stone.

When the hearing came on, there was no case made against the first supposed delinquent; for, Fawcett the only witness, said that at such a distance of time he could not swear that Johnson had drunk the treason-

<sup>1</sup> The following is Horace Walpole's account of this gentleman, in his sketch of the court of the Pretender:—"His next prime minister was Murray, nominal Earl of Dunbar, brother of the Viscount Stormont, and of the celebrated Solicitor General. He was a man of artful abilities, graceful in his person and manner, and very attentive to please. He had distinguished himself before he was of age, in the last parliament of Queen Anne, and chose to attach himself to the unsuccessful party abroad, for whose re-establishment he had co-operated. He, when still very young, was appointed governor to the young princes; but, growing suspected by the warm Jacobites of some correspondence with Sir Robert Walpole, and not entering into the favorite project of Prince Charles' expedition to Scotland, he thought fit to leave that court and retire to Avignon, where, while he was regarded as lukewarm to the cause, from his connexion with the Solicitor General here, the latter was not at all less suspected of devotion to a court where his brother had so long been first minister."



able healths, or had been present at the drinking of them.<sup>1</sup> But he positively averred that “both Stone and Murray, on various occasions down to so late as the year 1732, had, at Mr. Vernon’s house, drunk the health of the Pretender, and once he was sure they had done so on their knees: the conversation was wont to be partly literature, partly treason; the customary healths, *THE CHEVALIER* and *THE EARL OF DUNBAR*.” However, on his cross-examination, he prevaricated a good deal, and it appeared that he was actuated by an undue wish either to spite or to screen his old associates.

Stone, although he had so loudly demanded the inquiry, was generally supposed to be the most seriously liable to the charge; and there is now much reason to suspect that he tinctured the mind of his royal pupil with Jacobitical or high-Tory principles,—telling him that, although it was impossible to recall the Stuarts, they had been unjustly expelled, and that *the divine right of kings* ought to be the rallying cry of the new dynasty which God had placed upon the throne. He soon after fell into obscurity; but great interest was then excited by his case, from a general wish that he should be removed and make way for a more enlightened and liberal instructor. His defence was said to be very ingenious, but no part of it has been preserved. The following is a slight sketch of the address of the Solicitor General:—

“Illiberal and unfair reflections have been made on the political principles of my relations; but, my Lords, I was early sent to seek my own way in the world; I learned to form opinions for myself, and I have been well affected to the present establishment ever since I could think on the subject. When I went to the University of Oxford I took the oaths to the Government, and I did so with seriousness and *ex animo*. Pleading in the courts at Westminster and at the bar of either House of

<sup>1</sup> He afterwards wrote the following suspicious letter to clear the Bishop, who, hearing that he was repeating the calumny, insisted on a written recantation from him:—

“London, 29th January, 1753.

“My Lord,—I take the liberty of giving you the trouble of this letter, in order to wipe off any reflections which may have been to your Lordship’s prejudice from a misconstruction or misrepresentation of anything said by me at the Dean of Durham’s last summer. It is now, I believe, near twenty years since your Lordship and I met at my relation’s, and before that time I never had any acquaintance with your Lordship; and it really surprises me very much, that any inference from what I said of my relation’s principles in politics should, by any one, be applied to your Lordship. It is a very disagreeable thing to be giving an account of what has passed in any conversation; but it is my duty, in the most solemn manner, to declare, that I did not, and could not, say anything which in the least could, or which was any way meant by me to charge your Lordship with being the proposer of, or ever being present at the drinking of any disloyal healths. I am very sorry for the trouble you have had about this affair, and am with the greatest respect,

“My Lord,

“Your Lordship’s most obedient humble servant,

“CHR. FAWCET.

“Whatever has been construed as a surprise of mine at your Lordship’s preferment, I am sure it was meant by me as an intimation only that your Lordship was fortunate in having the preferments drop at the time they did.

“Lord Bishop of Gloucester.”

Parliament, I never uttered a word to disparage the Protestant settlement, or to create any longing for the exiled family. I determined never to come into the House of Commons but upon Whig principles, and I at last accepted a seat under the auspices of a noble Duke, now present, who, for forty years, has been the firmest friend of the Hanoverian line. With regard to office, can it be supposed that a person of Sir John Strange's well-known loyalty would have resigned in my favor if he had not been thoroughly convinced of my sincerity? Considering my position at the bar, I had little to gain by making any concessions for official rank; and, ever since I have been in the King's service, I have got nothing by my employment (I am sure I do not speak it reproachfully) but the ordinary fees for the business which has occupied my time. No friend of mine have I ever recommended to preferment. I have not been able to learn any objection to my public conduct except that, in prosecuting the rebel Lords, I did not load them with reproachful epithets; as if epithets would have added to their guilt. I never considered that such language would be agreeable to my royal master; and, if I had been counsel for the Crown against Sir Walter Raleigh, and that unfortunate man had been as clearly guilty of high treason as the rebel Lords, I would not have made Sir Edward Coke's speech against him to gain all Sir Edward Coke's estate and all his reputation."

He then commented minutely and forcibly on the evidence of Fawcett; and having thanked the Lords for their indulgence in hearing him, and the goodness and justice by which the King was actuated in desiring that his servants should not be stabbed in the dark, he concluded by a solemn declaration that he had never given any treasonable toasts at Mr. Vernon's or elsewhere, and that he had never consciously been present when any such toasts were drunk.<sup>1</sup>

Mr. Murray having concluded, the Lords of the Council came to a unanimous resolution of reporting to his Majesty "that there appeared to them no foundation for any part of the charge, and that the characters of the parties accused were in no degree affected by it."<sup>2</sup>

The discussion was revived before Parliament by a motion of the Duke of Bedford for an address to the King, praying that he would be graciously pleased to direct a copy of all these proceedings to be laid before [MARCH 22.] the House of Lords; but this was negatived without a division,<sup>3</sup> and no further inquiry was made into the circumstances.<sup>4</sup>

<sup>1</sup> Some accounts say that he voluntarily took an oath before the Lords of the Council to the same effect; but this I do not believe, for he would hardly have ventured on such an appeal to Heaven, under the reservation in his own mind that the toasts were drunk in frolic, and that, in the midst of vamping language, there was no real design of treason.

<sup>2</sup> Hall. 98—104.; Doddington's Diary, 211—235.; Walpole's Memoirs of the Reign of George II., i. 266—290.

<sup>3</sup> This debate is not mentioned in the Parliamentary History, but a full account of it is given by Horace Walpole, Mem. Geo. II., vol. i. p. 272—290.

<sup>4</sup> An attempt was made to ridicule the Duke of Bedford, and to laugh away the whole affair by a *jeu d'esprit*, which thus began:—

"To probe thy crimes, disloyal Fiend,  
See council of the state convened.

Thus Murray preserved his position, notwithstanding an accusation which threatened such serious consequences. Although it did not in any degree hinder his advancement in public life, it somewhat damaged his reputation for sincerity, and it afforded a topic to his opponents of which they ever after unsparingly availed themselves. They perceived that there was a vulnerable point, at which they might aim a staggering blow ; and, subsequently, on important occasions, he betrayed an increased timidity, which materially impaired the effect of his consummate talents for debate.

Soon after the close of this inquiry Pitt resigned his office, being mainly induced to do so from the difficulty he had for some time experienced in gratifying his propensity to assail his old rival. He made ample amends for his late unwilling forbearance. Thus, in uttering a vehement invective against the University of Oxford for its Jacobitism, he palpably referred to the supposed youthful opinions of Mr. Murray :—

“The body he was describing,” he said, “was learned and respectable ; so much the more dangerous ! He would mention what had happened to himself the last summer, on a party of pleasure thither. They were at the window of the Angel Inn ; a lady was desired to sing *GOD SAVE GREAT GEORGE OUR KING*. The chorus was re-echoed by a set of young lads drinking at a college over the way, but with addition of rank treason. He hoped, as they were boys, he should be excused for not having taken more notice of them. Perhaps some of them might hereafter zealously fill the office of Attorney or Solicitor General to a Brunswick Sovereign. After this, walking down the High Street, in a bookseller’s shop he observed a print of a young Highlander with a blue ribbon. The bookseller, thinking he wanted it, held it out to him. But what was the motto ? *Hunc saltem everso juvenum !* This was the prayer of that learned body. Yet, if they are disappointed in their plots, the most zealous of them, when leader of the Government party in this House, may assure you that he always approved of the Protestant succession, and that he refused to enter parliament except upon Whig principles.”

“Colors, much less words,” adds Horace Walpole, who has reported this speech, “could not paint the confusion and agitation that worked in Murray’s face during this almost apostrophe. His countenance spoke everything that Fawcett had been terrified to prevaricate away.”<sup>1</sup>

We shall find that Pitt long afterwards returned to the assault with the same weapon in his hand, and that it was unmercifully used by Junius and by Horne Tooke against Lord Chief Justice Mansfield in the succeeding reign.

‘My Lords’ (an age-wise peer address),  
 ‘These crimes convulse my loyal breast :  
 Ere manhood’s down, accusers say,  
 Had graced his chin, ere taught to pray,  
 He drank, afraid of no detection,  
 Disloyal healths with genuflection.’ ”

<sup>1</sup> Walp. Mem., i. 358.

Murray closed the longest and most brilliant Solicitor Generalship recorded in the annals of Westminster Hall by a service of lasting importance to the rights of Great Britain, upon which depends her greatness as a maritime power. The King of Prussia, backed by some neighbouring states, had sought to remodel the law of nations in a way that would have rendered naval superiority in time of war of little avail, by asserting that belligerents are not entitled to seize upon the ocean the goods of enemies in neutral ships; by insisting that contraband of war, the property of neutrals, may be carried by them to enemies' ports; by denying the rights of belligerents, under any circumstances, to search the vessels of neutrals; and by attacking the legality and validity of all proceedings in the Courts of Admiralty of England for a condemnation of neutral ships or goods by reason of an alleged violation of the duties of neutrality. These pretensions were embodied in a memorial presented by M. Michell, the Prussian minister at the Court of St. James's. The masterly answer to it is assigned by Sir George Lee, Judge of the Prerogative Court, Dr. Paul the Advocate General, and Sir Dudley Ryder the Attorney General, as well as Mr. Murray, the Solicitor General; but we know, from undoubted authority, that the composition of it was exclusively his.<sup>1</sup> Having myself been employed to write such papers, I may possibly be not unqualified to criticise it, and I must say that I peruse it with a "mixed sensation of admiration and despair." The distinctness, the precision, the soundness, the boldness, the caution, which characterize his propositions, are beyond all praise; and he fortifies them by unanswerable arguments and authorities. Preserving diplomatic—nay, even judicial calmness and dignity,—he does not leave a tatter of the new neutral code undemolished. Thus, with imperishable granite he laid the foundation on which the eternal pillar of England's naval glory has been reared.

This performance particularly excited the admiration of the President Montesquieu, who said it was "*réponse sans réplique*." It is the great repertory to which our advocates and judges have had recourse when any part of these dangerous pretensions have been readvanced. Sir William Scott (Lord Stowell) often quoted it, always spoke of it with reverence, and represented his own decisions, which are received with submission throughout the civilized world, as only an expansion of its principles.

It would be desirable to relieve the tiresomeness of these details by describing the Solicitor General as he appeared in the social circle, but at this period we know hardly anything of him except as a lawyer or a politician. After the death of Pope, although he by no means neglected literature, he does not seem to have admitted any literary character to his intimacy. I am sorry I cannot find that he ever noticed his countryman Thomson, or that he ever desired to be introduced to the author of the Rambler. In truth, he was so overwhelmed by professional and official business, that, when he could escape from it for a brief interval,

<sup>1</sup> Holliday, 424.



he preferred repose, with less intellectual society, to gladiatorial contests with the rising wits of the age. He continued gratefully attached to those who had been kind to him in his juvenile days, and he still used often to visit the first Lord Foley on a Saturday in the country, and remain with him till the Monday morning, when business called him back to town. "On a brother barrister interrogating him how he could spend his time where so little pleasantry or liveliness prevailed,—'It is enough,' said he, 'if I contribute by my visits to the entertainment of my *fast friends*; or, if I fail in that, I am sure to contribute by lassitude to the repose of my own faculties.'"<sup>1</sup>

If he did not foster any young poet, he deserves the credit of discovering and turning to public usefulness the genius of Blackstone as a jurist. The professorship of civil law in the University of Oxford being vacant, he recommended this extraordinary man, then quite unknown, as decidedly the fittest person to fill it. The Duke of Newcastle promised him the appointment; but, ever eager for a dirty job rather than for the public good, he thought it right to probe a little the political principles of the candidate, and to ascertain how far he could be relied upon as a party tool, and, *more suo*, he thus addressed Mr. Blackstone when presented to him: "Sir, I can rely on your friend Mr. Murray's judgment as to your giving law-lectures in a good style, so as to benefit the students; and I dare say I may safely rely upon you whenever anything in the political hemisphere is agitated in that University, you will, sir, exert yourself in our behalf." The answer was, "Your Grace may be assured that I will discharge my duty in giving law-lectures to the best of my poor abilities." "Ay, ay," replied his Grace, hastily, "and your duty in the other branch, too." Blackstone made a hesitating bow, and, a few days after, had the mortification to find, from the Gazette, that Jenner, utterly ignorant of law, civil, canon, and common, but considered the best electioneering agent in the whole University, was appointed to expound the Pandects, which he had never read, and could not construe.

Murray behaved with spirit and judgment; for he advised Blackstone to settle at Oxford, and to read law-lectures to such students as were disposed to attend him. The plan had splendid success, and, happily, soon after suggested to the mind of Mr. Viner the establishment of a professorship for the Common Law of England in the University of Oxford. To this we owe the immortal Commentaries of Blackstone, which, when they were given to the world, drew forth the following high attribute of approbation from him to whose judicious patronage they were to be traced. A brother peer having asked him, as a friend, what books he would recommend for his son, who was determined to be a lawyer, the Chief Justice replied,—

"My good Lord, till of late I could never with any satisfaction to myself answer such a question; but since the publication of Mr. Blackstone's Commentaries I can never be at a loss. *There* your son will find analytical reasoning, diffused in a pleasing and perspicuous style.

<sup>1</sup> Holliday, 131.

*There* he may inhale imperceptibly the first principles on which our excellent laws are founded ; and there he may become acquainted with an uncouth crabbed author, Coke upon Littleton, who has disgusted and disheartened many a Tyro, but who cannot fail to please in the modern attire in which he is now decked out."

Murray had been Solicitor General for the unexampled period of twelve years, and grumbled at his bad luck in so long holding a subordinate office. Not only was the chief responsibility of legal business thrown upon him, but, while the Attorney General was politically a mere cipher, he himself was relied upon as the most efficient defender of the policy of the Government in the House of Commons. An event now happened which many thought would at once place Murray in the situation of Prime Minister—the sudden death of [MARCH 3, 1754.] Mr. Pelham. Who was to succeed him? The Duke of Newcastle, notwithstanding his immense borough patronage and his low talent for intrigue, was pronounced by George II. as fit only to be "master of the ceremonies at a small German court ;" and the nation aware of his frivolity and his absurdities, concurred in this opinion. Pitt and Henry Fox were both men of splendid abilities, but they were both disliked by the King, and neither of them then had a sufficient aristocratic connection or popular reputation to be able to storm the Cabinet. Murray, even in Pelham's lifetime, had been virtually the leader of the Lower House, and there would have been little change in the aspect or proceedings of that assembly if he had been put at the head of the Treasury. He was very agreeable to the King, and he was generally respected by the nation. A serious objection to him arose in some quarters from the suspicion of *Jacobitism* ;—not that any one believed he would betray his trust and try to bring in the Pretender,—but some thinking men were afraid of his acting upon arbitrary principles of government, and many condemned him for the duplicity of which they believed he had been guilty. From personal reasons, Pitt and Fox, who still held office, both opposed his advancement ; and even Lord Hardwicke, the Chancellor, viewed him with an eye of jealousy.<sup>1</sup> Had Murray himself really desired the elevation, and made a bold effort to obtain it, all these difficulties would probably have been overcome, and our party history at the conclusion of this and the commencement of the succeeding reign would have taken a very different turn ; but, from a prudent dread of the vicissitudes of ministerial life, and from a high feeling that his destiny called him to reform the jurisprudence of his country, he sincerely and ardently desired to be placed on the bench,—and the special object of his ambition was to be Chief Justice of England, with a peerage. Horace Walpole, indeed, sarcastically says "he was always waiving what he was always courting ;" but all impartial observers declare that he invariably refused to go out of his profession for any promotion.

The consequence was, that the Duke of Newcastle, the person most incompetent, and, therefore, least exciting jealousy of all who had been

<sup>1</sup> Walpole's Memoirs, vol. i. p. 329.

thought of on this occasion, became Prime Minister, to the astonishment of the whole nation,—from the King on the throne to his Grace's own lacqueys, who had often been jeered at by brother lacqueys in the lobby of the House of Lords while, addressed by their masters' titles, they discussed their masters' characters.

Murray at last gained a step in professional rank, being appointed Attorney General, on the elevation of Sir Dudley Ryder to the bench. At the same time, he undertook the arduous duty of being Government leader in the House of Commons, which he would probably have declined had he foreseen that Pitt, dissatisfied with this arrangement, was again to resign his office, and to go into hot opposition.

## CHAPTER XXXIII.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE WAS MADE LORD CHIEF JUSTICE OF THE KING'S BENCH.

SOON after Mr. Murray had been placed in his new position, he had the offer of professional advancement. Sir John Strange, the Master of the Rolls, died; and as the holder of this office may sit in the House of Commons, the Duke of Newcastle was willing to confer it upon his champion there. To the Chancellor's letter proposing this arrangement the following answer was received:—

“Clermont, Saturday, one o'clock.

“My dear Lord:—I have the honor of your Lordship's letter, & am most truly concerned for poor S<sup>r</sup> John Strange, whom I honored & loved extreamly for his many excellent publick qualities, & most amiable private ones. I scarce know any man, with whom I had so little acquaintance, that I should more regret.

“I am much obliged to you for your laying your thoughts before me in so kind & full a manner. There is every consideration which can come in question upon this occasion, stated in the plainest & most impartial light. To be sure it should be offered to the Attorney General. Common justice & proper regard require it & therefore I hope y<sup>r</sup> Lordship will sound him upon it, *this evening*. I shall take no notice to him of it, directly or *indirectly*. It is fit that your Lordship sho<sup>d</sup> have the whole transaction of this affair, & I shall approve whatever you do in it, as he likes best: I cannot at all guess what he would do. For the King's service, it is, I think, to be wished that he should remain where he is; but, as his health is not quite good, & this is a very honorable station, consistent with his seat, figure, & use in the House of Commons, I cannot pretend to judge what he will do. If he sho<sup>d</sup> accept it, it will be difficult to replace him.”

Murray, without hesitation, declined the office, as he considered it of a



subordinate character, and not by any means opening to him the opportunity to which he aspired of making a great name as a Judge.

The two next years, although, varied by strong excitement, must have [A. D. 1754–1756.] been fertile of anxiety and annoyance to Murray, and he must sometimes have longed for the obscure repose of the Rolls. He had to defend an Administration which was feeble and unfortunate; and he was constantly assailed by an opponent of an unparalleled power in invective and sarcasm, wholly unscrupulous in choosing topics and expressions most to his purpose, and animated against him by long rivalry and personal dislike.

Unfortunately, the Parliamentary History at this time is almost a blank; the few pages which it gives to several sessions being filled up with King's speeches and addresses of the two Houses in return. But memoir-writers furnish us with a lively description of some of the conflicts which took place, and of the general results. "Pitt," says Lord Waldegrave, "undertook the difficult task of silencing Murray, the Attorney General, the ablest man as well as the ablest debater in the House of Commons."<sup>1</sup> Horace Walpole himself, then a member of the House of Commons, in reference to the outset of the new Administration, observes,—

"Murray, who at the beginning of the session was awed by Pitt, finding himself supported by Fox, surmounted his fears, and convinced the House, and Pitt too, of his superior abilities. He grew most uneasy to the latter. Pitt could only attack; Murray only defend. Fox, the boldest and ablest champion, was still more formed to worry; but the keenness of his sabre was blunted by the difficulty with which he drew it from the scabbard; I mean the hesitation and ungracefulness of his delivery took off from the force of his arguments. Murray, the brightest genius of the three, had too much and too little of the lawyer: he refined too much, and could wrangle too little, for a popular assembly. Pitt's figure was commanding; Murray's engaging, from a decent openness; Fox's dark and troubled; yet the latter was the only agreeable man. Pitt could not unbend; Murray in private was inelegant; Fox was cheerful, social, communicative. In conversation none of them had wit: Murray never had: Fox had in his speeches, from clearness of head and asperity of argument. Pitt's wit was genuine; not tortured into the service, like the quaintnesses of my Lord Chesterfield."<sup>2</sup>

Henry Fox, in a letter to a friend, after giving some account of two speeches delivered by Pitt in the following session, adds, "In both speeches, every word was *Murray*; yet so managed, that neither he nor any body else did or could take public notice of it, or in any degree reprehend him. I sat near Murray, who suffered for an hour."<sup>3</sup>

"On another occasion," according to Mr. Butler, "Pitt made use of an expression of savage triumph which was long in every mouth. Having for some time tortured his victim by general invective, he suddenly stopped, threw his eyes around, then, fixing their whole power on

<sup>1</sup> Walp. Mem., p. 31.

<sup>2</sup> Walp. Mem., i. 490.

<sup>3</sup> Appendix to Lord Waldegrave's Mem., p. 153.



Murray, uttered these words in a low, solemn tone, which caused a breathless silence: 'I must now address a few words to Mr. Attorney: they shall be few, but they shall be daggers.' Murray was agitated; the look was continued; the agitation increased. 'Judge Festus trembles!' exclaimed Pitt; 'he shall hear me some other day.' He sat down. Murray made no reply, and a languid debate proved the paralysis of the House."<sup>1</sup>

The qualities of the rival orators are well contrasted by my friend Mr. Welsby:—

"In closeness of argument, in happiness of illustration, in copiousness and grace of diction, the oratory of Murray was unsurpassed; and, indeed, in all the qualities which conspire to form an able debater, he is allowed to have been Pitt's superior. When measures were attacked, no one was better capable of defending them; when reasoning was the weapon employed, none handled it with such effect; but against declamatory invective his very temperament incapacitated him from contending with so much advantage. He was like an accomplished fencer, invulnerable to the thrusts of a small sword, but not equally able to ward off the downright stroke of a bludgeon."<sup>2</sup>

Nothing, however, gives us such an exalted opinion of the powers of both these extraordinary men as the praise of one who was himself an elegant speaker, who was their contemporary, who had often listened to them, who had no personal favor for either of them, and who loved much more to sneer than to flatter. Thus writes Lord Chesterfield to his son:—

"Your fate depends upon your success as a speaker; and take my word for it, that success turns more upon manner than matter. Mr. Pitt, and Mr. Murray the Attorney General, are beyond comparison, the best speakers. Why? Only because they are the best [A. D. 1755.] orators. They alone can inflame or quiet the House; they alone are attended to in that numerous and noisy assembly, that you might hear a pin fall while either of them is speaking. Is it that their matter is better, or their arguments stronger, than other people's? Does the House expect extraordinary information from them? Not in the least; but the House expects pleasure from them, and therefore attends; finds it, and therefore approves."

Murray had some consolation for the troubles and anxiety he went through in the opportunities which his influence with the Prime Minister gave him of obliging others. He was now able to procure for his friend Lord Milton the appointment to the office of Lord Justice Clerk, the highest Criminal judge in Scotland; which he thus announced to him:—

"Kenwood, Oct. 18, 1755.

"My dear Lord,—I have just rec<sup>d</sup> the favor of yours. If there was but a remote possibility that I could be of use in anything which concerned you and your family, I shou<sup>d</sup> have reason to take it very ill if you did not let me know it. I happened to be with the Duke of New-

<sup>1</sup> Butler's Remains, i. 154.

<sup>2</sup> Eminent Judges, p. 392.

castle yesterday about 12 o'clock when the D. of Argyll's letter came. I think I may wish you joy of the thing being done. The Chan<sup>r</sup> is at Wimple; but when I left the D. of N. he was determined to do it immediately without waiting to consult any body, therefore I need say no more, for I need not tell you how much I am

"Your aff. & ob. hu. serv<sup>t</sup>

W. MURRAY."

Notwithstanding the *éclat* which Murray obtained from the contest he was carrying on in the House of Commons, and the power and patronage he enjoyed, he was most heartily sick of his position; and at the close of the session in May, 1756, he expressed deep regret that he had not adhered to the profession to which he was originally destined, so that he might have been vegetating unseen as the vicar of some remote parish. He often declared that he wished to have for his companions only the schoolmaster, the apothecary, and the exciseman; and that he desired to [A. D. 1756.] know nothing of politics, except from a weekly newspaper taken in by the village club.

After the prorogation, the state of affairs, instead of mending, became more disastrous. The Duke of Newcastle's imbecility had involved the country in hostilities with France, and the war, which under other auspices was hereafter to be so glorious, began most unfortunately. Minorca was taken,—what was worse, the national honor was considered tarnished by the flight of Admiral Byng without an effort to relieve Port St. Philip's; and the clamor against the Government rose almost to frenzy. With what horror did Murray look forward to the reassembling of Parliament! How did he expect to quail under the vituperation of his rival! At this time his situation certainly was very disheartening. There seemed to be no chance of any honorable retreat for him. Sir Dudley Ryder had only been Chief Justice of the King's Bench two years, and, being in a green old age, and likely long to fill the office, was about to be raised to the peerage.

The day after Mr. Attorney General prepared the bill for the new [MAY 25.] barony, he heard that Sir Dudley Ryder was dead. Although he, no doubt, would have made every effort and submitted to any sacrifice for the purpose of preventing this catastrophe, we can hardly suppose that it excited no pleasurable feeling in his mind.

He immediately put in his claim for the vacant office. All perceived that this promotion must bring about an immediate change in the Government. Charles Townshend, then an Opposition leader, said to him, "I wish you joy, Mr. Attorney; or, to speak truly, I may wish joy to myself, for you will ruin the Duke of Newcastle by quitting the House of Commons, and the Chancellor by going into the House of Lords."<sup>1</sup> The Duke of Newcastle, who, notwithstanding his general obtuseness, was very acute in such matters, declared that "the writ for creating Murray Chief Justice would be the death-warrant of his own administration," and resolved to try every possible expedient for the purpose of

<sup>1</sup> Walpole's Mem., ii. 64.

keeping him in the House of Commons. The negotiations (consisting only of earnest entreaties on one side, and flat refusals on the other) lasted several months, during which the Duke always rose in the tempting bribes which he offered,—beginning with the duchy of Lancaster for life, and, after tellerships and reversions without end for himself and his nephew, Lord Stormont, ending with the offer of a pension of 6000*l.* a year if he would only stay in the House of Commons till the address was carried and the new session fairly begun. Murray, who saw full well that, in spite of any exertion he could make, the Ministry must be beaten on the address, declared that “he would on no terms agree to remain in the House of Commons for one session longer, or one month, or one day even to support the address; and that he never again would enter that assembly.” Horace Walpole, in his usual satirical tone, says, “He knew that it was safer to expound laws than to be exposed to them; and, exclaiming ‘*Good God! what merit have I, that you should load this country, for which so little is done with spirit, with the additional burthen of 6000*l.* a year?*’ at last peremptorily declared that if he was not to be Chief Justice, neither would he any longer be Attorney General.”

The Duke of Newcastle and the Lord Chancellor, who were equally desirous to keep Murray where he was, were at last so far overcome by his firmness as to offer him the office of Lord Chief Justice of the King’s Bench; but stoutly made a difficulty about his peerage, in the hope that, not gaining all he desired, he might still change his mind. From the following letter to Lord Hardwicke it appears that there had been a good deal of discussion on this subject:—

“June 26, 1756.

“My Lord,—I don’t know whether the way in which I chose to express myself last night, when I said I had always considered the peerage & Ch. J. as going together, sufficiently conveyed that without the one I wished to decline all pretensions to the other.

“Upon reflexion, as I have no hesitation, & never thought otherwise, I think it the most decent way to speak to be understood; for it wou’d grieve me extremely to have the King twice troubled in any respect on my account. No possible event can alter my anxiety for his ease or service.

“I beg once more to give vent to the sentiments of my heart by saying, that the sense of my obligations to your *ld<sup>s</sup>* will be as conspicuous as my friendship to the Duke of Newcastle, which can only end with the life of

“Y<sup>r</sup> L<sup>ds</sup> most obliged, & obdt humble serv<sup>t</sup>

“W. MURRAY.<sup>1</sup>

The Duke of Newcastle, pretending that the King was very reluctant to grant the peerage, wrote thus to the Attorney General:—

“Kensington, July 2, 1756.

“Dear Sir,—The King ask’d, whether I had seen *Murray*. I said, yes. “Well, what says he?” “Extremely sensible, Sir, of your Ma-

<sup>1</sup> Hardwicke MSS., Wimple.



jesty's great goodness to him, but wishes not to accept the one without the other.' 'Why! must I be forced? *I will not make him a Peer 'till next session.*' 'Sir, all that Mr. Murray desires is, that they may be defer'd. I apprehend that it would be difficult, tho' perhaps possible, to make the Chief Justice this term.' 'I know, that may be delay'd; or it is not necessary to do it now;'—and here ended the discourse. I hope I have done right. I am sure I intended it; but it is my misfortune to be distrusted by those from whom I never did deserve it.

"I am, dear Sir,

"Ever yours,

"HOLLIS NEWCASTLE."<sup>1</sup>

Murray was evidently aware of the juggle, and declared that without the peerage he would neither accept the Chief Justiceship nor remain Attorney General.

If we may trust to the sincerity of the following letter from the Duke of Newcastle to Lord Hardwicke, his Grace had first given way:—

"Was I singly to consult my own wishes, or perhaps my own interest, your Lordship knows what my thoughts are; but when I consider that the present question is, whether Mr. Attorney General shall remain in the House of Commons, *out of the King's service*, or be Ch. Justice & a peer, I own I think the first would be attended with great inconveniences to the King's service, & I should hope that his Majesty would be graciously pleased to grant his request, in consideration of the zeal & ability which he has showed for a considerable number of years, in the employments with which his Majesty has honored him."

It was pretty plainly perceived that if Mr. Murray were now refused his just demands he might be expected to be seen speedily in the House of Commons an Opposition leader; and, the King's scruples being easily overcome, the Chancellor wrote to announce that Mr. Attorney was to be Chief Justice and a peer. The following is the cold, stiff, and hypocritical reply:—

Sunday night, Oct. 24, 1756.

"My Lord,—I am just come to town, and found your Lordship's letter. It is impossible to say how much I feel your Lordship's great goodness and attention to me throughout this whole affair. The business of my life at all times and on all occasions shall be to show the gratitude with which I have the honor to be

"Your Lordship's most obliged

"and obt<sup>h</sup> hum : serv<sup>t</sup>

"W. MURRAY."

On Monday, the 8th day of November, 1756, Murray was sworn in Chief Justice of the King's Bench before Lord Chancellor Hardwicke, and created a peer by the title of Baron Mansfield, of Mansfield in the county of Nottingham. The following day the Administration to which he had belonged was dissolved; but surely he is not to be blamed for the firmness which he exhibited in refusing to remain longer its champion in the House of Commons.

<sup>1</sup> Hardwicke MSS., Wimple.



No party considerations could require from him a useless sacrifice; and, for the welfare of the state, it was much better to bend to public opinion, and to make way for a new minister who might restore confidence and conduct the war in which England was involved to an honorable issue. Morally speaking, he had as good a right to the office which he demanded, as the eldest son has to the fee-simple lands of which his father died seised. He was by far the fittest man in the profession to fill it, and he had earned it by political services such as no law officer had ever rendered to any government.

The appointment was almost universally praised. A very few illiberal individuals, trying as far as they were able to justify the imputation cast upon the English by Lord Lovat when he said that his "cousin Murray's birth in the north might mar his rise," grumbled because a Scotsman was placed at the head of the administration of justice in Westminster Hall, and tried invidiously to account for his rise by saying that "he had no merit beyond the dogged industry which distinguished his poverty-stricken countrymen;"<sup>1</sup> but all generous spirits frankly admitted his superiority for genius and acquirements, and scornfully repudiated the notion that, after the whole island of Great Britain had been united under a common legislature, regard was to be had, in filling any office under the crown, to the birth-place rather than to the qualifications of the candidate.

Before following him in the new sphere which he entered, I ought to notice the graceful manner in which he concluded his career at the bar. To comply with ancient forms, it was necessary, as a preliminary step to his becoming a judge, that he should take upon himself the degree of the coif, and be transferred from Lincoln's Inn to Serjeant's Inn. The head of the society of which leave is taken, on this occasion, in a com-

<sup>1</sup> Thus he was assailed in a letter, addressed to the editor of a newspaper supposed to have been written by a brother lawyer with whom he was on familiar terms of intimacy:—"I should be sorry to see a Scotchman on an English bench of justice, for several reasons; which I hope may occur to the wisdom of the great in power before such judges are appointed, as it may not be very proper for me to mention them. An Englishman ought not to be put under the dominion of a Scot. It would prove an indelible reflection upon us to see a Scot in so high a station, when so many of our own countrymen are infinitely better qualified and more deserving of preference. I remember an old friend of mine used to tell me of 'a termagant Scot,' as Shakspeare phrases it, that domineered at the bar of one of our courts of justice, in the reign of one of our kings who was second of his name,—probably Charles or James the Second, for it is natural to believe the *plaid* might meet with encouragement here in these reigns. This Scot emerged from his native wealds, rocky caverns, and mountainous heights pretty early in life, to *fineer* over a Scotch education with a little English erudition, and undoubtedly for preferment too. He brought along with him the same principles of government and loyalty as his country and family were remarkable for, and what his brother carried over to Rome, like apples to Alcinous, or coals to Newcastle. One would think such an opportunity might have had some gentle influence on the rugged nature of our emigrant, his pauper pride and native insolence; but it happened otherwise, for the Scot could not alter his nature; and so, in the midst of all the learning of our courts, he continued still a very Scot."—*Broad-bottom Journal*.

plimentary speech, addresses the retiring member,—who makes a suitable reply. The Honorable Charles Yorke (afterwards so brilliant in his life, and so unfortunate in his death) was then Treasurer of Lincoln's Inn. In presenting to the new Serjeant the votive offering of a purse of gold, he with good taste as well as warmth referred to the lustre he had conferred upon the English bar, and the qualifications he possessed for the high office to which he was appointed by the King with the most auspicious anticipations of the people. The following was the beautiful reply, —which, we are told by Mr. Holliday, who was present, was delivered with the greatest grace, ease and perspicuity :"<sup>1</sup>

"I am too sensible, sir, of my being undeserving of the praises which you have so elegantly bestowed upon me, to suffer commendations so delicate as yours to insinuate themselves into my mind ; but I have pleasure in that kind of partiality which is the occasion of them. To deserve such praises is a worthy object of ambition ; and from such a tongue flattery itself is pleasing.

"If I have had, in any measure, success in my profession, it is owing to the great man who has presided in our highest courts of judicature the whole time I attended the bar. It was impossible to attend him, to sit under him every day, without catching some beams from his light. The disciples of Socrates, whom I will take the liberty to call the great lawyer of antiquity, since the first principles of all law are derived from his philosophy, owe their reputation to their having been the reporters of the sayings of their master. If we can arrogate nothing to ourselves, we can boast the school we were brought up in ; the scholar may glory in his master, and we may challenge past ages to show us his equal.

"My Lord Bacon had the same extent of thought, and the same strength of language and expression ; but his life had a stain.

"My Lord Clarendon had the same ability and the same zeal for the constitution of his country ; but the civil war prevented his laying *deep* the foundations of law, and the avocations of politics interrupted the business of the Chancellor.

"My Lord Somers came the nearest to his character ; but his time was short, and envy and faction sullied the lustre of his glory.

"It is the peculiar felicity of the great man I am speaking of, to have presided very near twenty years, and to have shone with a splendor that has risen superior to faction, and that has subdued envy.

"I did not intend to have said, I should not have said so much on this occasion, but that in this situation with all that hear me, what I say must carry the weight of testimony rather than appear the voice of panegyric.

"For you, sir, you have given great pledges to your country ; and large as the expectations of the public are concerning you, I dare say you will answer them.

"For the Society I shall always think myself honored by every mark of their esteem, affection, and friendship, and shall desire the continuance

<sup>1</sup> Holliday, p. 104.

of it no longer than while I remain zealous for the constitution of this country, and a friend to the interests of virtue."

Mr. Holliday, worked up to enthusiasm by the recollection of the scene he had witnessed, "bears ample testimony to the tribute of applause, to the general joy and the marked approbation of the audience."<sup>1</sup> On this occasion Mr. Serjeant Murray gave a grand dinner in Lincoln's Inn, rivalling the splendor of the olden time, to many of the nobility as well as to the chiefs of the law.<sup>2</sup>

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## CHAPTER XXXIV.

### VIEW OF LORD MANSFIELD'S JUDICIAL CHARACTER AND OF HIS DECISIONS.

WE are now to behold Lord Mansfield a venerable magistrate, clothed in ermine, seated on his tribunal, determining the most important rights, and adjudicating upon the lives of his fellow-citizens. He presided in the Court of King's Bench for the first time on Thursday the 11th of

<sup>1</sup> Page 106.

<sup>2</sup> The following is the Order issued by the Benchers for regulating the solemnity:—

"At an Extraordinary Council, held the 2d day of November, 1756.

"Ordered—That the gates leading to Portugal Street, Chichester Rents, and Bishop's Court from Lincoln's Inn be shutt on Monday next, from ten in the morning for the remaining part of that day.

"That the two great gates be shutt from ten in the morning for the remainder part of that day; and that six porters and two constables attend at each of those gates in order to lett in the nobility, judges, and other company who are to dine at the Serjeant's feast, as likewise to lett in the members of the Society and their friends.

"That the passage to the Hall be boarded up, and doors made as usual to lett the company into the Hall; and that two porters and a constable attend at each of those doors.

"That the garden gates be shutt all that day.

"That the gardener, his man, and two porters do patrole the terras walk, to prevent any person from coming over the wall.

"That Mr. Johnson, the steward to this Society do hire twelve extraordinary porters, or such number of porters as shall be necessary to do the necessary duty on that day; and he do appoint the several porters to their several stations.

"That great care be taken that there be no disturbance or riott committed in the Inn on that day.

"That in case the porters or other servants do not keep good order, or are negligent in doing of their duties, that Mr. Johnson do report their misbehaviour at the next council.

"That the cooks (Messrs. Davis and Cartwright) who are to dress the Serjeant's dinner, have the use of the kitchen and all the offices belonging thereto, together with the furniture of the same; and that Mr. Johnson do intimate to them that they are to provide such chairs for the company as shall be wanting."

November, 1756. Modern usage does not permit a judge to deliver an inaugural address, or we should have had from him a striking enumeration of the duties imposed upon the person filling this high office, and a masterly exposition of the manner in which they ought to be performed. Although he did not then delineate in the abstract the *beau idéal* of a perfect judge, he afterwards proved to the world by his own practice that it had been long familiar to his mind.

I feel the extreme difficulty of an attempt to present to my readers a view of Lord Mansfield's judicial character and of his decisions. I am disheartened by the utter failure of my predecessors;<sup>1</sup> but I must proceed at all risks, or this memoir would be compared to a life of Bacon, omitting all mention of his philosophy, or of Marlborough entirely passing over his campaigns. While the ensuing chapter may be entirely skipt by those who take interest only in personal anecdotes and party contests, it may be perused a second time by others who, knowing that the history of a country cannot be well understood without the study of its jurisprudence, are desirous of learning minutely what great magistrates actually did in administering justice to individuals and in aiming to improve the institutions over which they presided.<sup>2</sup>

Perhaps I ought to begin with considering the question "whether Lord Mansfield was indeed a great magistrate?" I remember the time when it was fashionable in Westminster Hall to mention his name with a sneer. One might have supposed that he was chiefly memorable for having tried to introduce into the Common Law, some "equitable doctrines" which had been rejected, and that having long imposed upon the world by his plausibility, he was at last discovered to have been ignorant and shallow. English lawyers in those days chose to take their opinions of him from two men, deeply versed in their profession, but entirely devoid of all other learning—who not only had no taste for his liberal acquirements, but actually bore him a deep personal grudge. Lord Eldon, having begun to practise in the Court of King's Bench under Lord Mansfield, took it into his head that the Chief Justice set his face against all except those who had been educated at Westminster and Christ Church; and he left the court with disgust, ever loudly and deeply cursing the supposed author of his early disappointment. Again, Lord Kenyon with some reason mortally hated his predecessor, who had strenuously opposed his appointment, because he did not wish to see in the seat of Chief Justice of England one who did not know the charac-

<sup>1</sup> No reader, professional or non-professional, can possibly get through the voluminous account of Lord Mansfield's judgments to be found in Holliday and Evans; and it has not suited the plan of any of the able writers who have given a sketch of Lord Mansfield's life to examine them, except in a very cursory manner.

<sup>2</sup> Gibbon's masterly sketch of the Roman Civil Law (*Decline and Fall*, ch. xlv.) is one of the most interesting parts of his great work. But I am afraid that I shall be supposed as much enamored of my craft as was of his the old minstrel who

"Poured to lords and ladies gay  
The unpremeditated lay."



ters of the Greek language, and of Latin knew only some scraps to be misquoted. Their hostility to the memory of Mansfield was sharpened by their common dislike of Buller, who, reverencing him to idolatry, was in the habit of drawing offensive comparisons between him and his detractors. The influence of the Lord Chancellor and of the Chief Justice was much greater than that of the disappointed *puisne* who had sought refuge in the obscurity of the Common Pleas, and those who were desirous of having "the ear of the Court" on either side of the Hall knew that they could in no way recommend themselves to favor more effectually than by talking of "the loose notions which had lately prevailed in certain quarters, and which were in the course of being happily corrected." The juniors took their tone from the leaders, and in the debating clubs of students in the Inns of Court the speakers were inflamed by a pious desire to restore the Common Law to its ancient simplicity.

But these delusions are no more; and Mansfield may now be compared to the unclouded majesty of Mont Blanc when the mists which for a time obscured his summit have passed away.

There are a few undeniable facts, which are quite conclusive to prove that he enjoyed an unparalleled ascendancy, and that this ascendancy was well deserved. Although he presided above thirty years in the Court of King's Bench, there were in all that time only two cases in which his opinion was not unanimously adopted by his brethren who sat on the bench with him. Yet they were men of deep learning and entire independence of mind. He found there Sir Thomas Denison, Sir Michael Foster, and Sir John Eardly Wilmot, who was afterwards Chief Justice of the Common Pleas, and refused the great seal. They were succeeded by Sir Joseph Yates;<sup>1</sup> Sir Richard Aston;<sup>2</sup> who had been Chief Justice of the Common Pleas in Ireland; Sir James Hewitt,<sup>3</sup> afterwards Lord Chancellor of Ireland, and a peer by the title of Lord Lifford; Sir Edward Willes;<sup>4</sup> Sir William Blackstone;<sup>5</sup> Sir William Henry Ashurst;<sup>6</sup> Sir Nash Grose;<sup>7</sup> and Sir Edward Buller.<sup>8</sup> Again, of the many thousand judgments which Lord Mansfield pronounced during the third part of a century, two only were reversed. The compliment to Chancellors that their decrees were affirmed amounts to very little, for the only appeal is to the House of Lords, where the same person presides, so that it may be considered *ab eodem ad eundem*. But a writ of error then lay from the King's Bench either to the Exchequer Chamber, constituted of the Judges of the Common Pleas and Exchequer, or to the House of Lords, to be heard before the Lord Chancellor and all the Judges of England, without any predisposition to affirm.<sup>9</sup> What will appear to my profes-

<sup>1</sup> Jan. 24, 1763.

<sup>2</sup> April 5, 1765.

<sup>3</sup> Nov. 1, 1766.

<sup>4</sup> Jan. 27, 1768.

<sup>5</sup> April 3, 1770.

<sup>6</sup> April 10, 1770.

<sup>7</sup> Feb. 9, 1777.

<sup>8</sup> April 6, 1778.

<sup>9</sup> At first starting, the holder of the great seal (Lord Keeper Henley) had no voice in the House of Lords; but when created Lord Northington he might have revenged himself for his decrees which had been upset with Lord Mansfield's concurrence. Then followed Lord Camden, a Whig Chancellor; and, although the two following Chancellors, Lord Bathurst and Lord Thurlow, were Tories, they bore no peculiar personal good-will to the Chief Justice of the King's Bench.

sional brethren a more striking fact still, strongly evincing the confidence reposed in his judicial candor and ability by such men as Dunning and Erskine, opposed to him in politics, who practised before him,—in all his time there never was a bill of exceptions tendered to his direction; the counsel against whom he decided either acquiescing in his ruling, or being perfectly satisfied that the question would afterwards be fairly brought before the Court and satisfactorily determined on a motion for a new trial.<sup>1</sup> I must likewise observe that the whole community of England, from their first experience of him on the bench, with the exception of occasional displays of party hostility, concurred in doing homage to his extraordinary merits as a judge. Crowds eagerly attended to listen to him when he was expected to pronounce judgment in a case of importance. To gratify public curiosity, the unknown practice began of reporting in the newspapers his addresses to juries; and all suitors, sanguine in their belief of being entitled to succeed, brought their causes to be tried before him, so that the business of the King's Bench increased amazingly, while that of the other courts of common law dwindled away almost to nothing. He was regarded, if possible, with still greater veneration in his native country, where they were not only proud of him for adding new lustre to the name of Scotsman, but grateful for the admirable manner in which, as a law lord in the House of Peers, he revised and corrected the decisions of their supreme court, giving new consistency and certainty both to their feudal and commercial code. Even the learned on the continent of Europe, who had hitherto looked upon English lawyers as very contracted in their views of jurisprudence, and had never regarded the decisions of our courts as settling any international question, acknowledged that a great jurist had at last been raised up among us, and they placed his bust by the side of Grotius and d'Aguesseau. In his own lifetime, and after he had only a few years worn his ermine, he acquired the designation by which he was afterwards known, and by which he will be called when, five hundred years hence, his tomb is shown in Westminster Abbey,—that of “THE GREAT LORD MANSFIELD.”

Therefore, notwithstanding the successful efforts of a few narrow-minded and envious persons to disparage him soon after his death, I think I must be justified in giving faith to the unanimous opinion of his

<sup>1</sup> When I was at the bar, I knew a learned Serjeant who never went into court without several blank bills of exceptions in his bag, or rather cartouche-box, to be filled up and fired off at the Chief Justice in the course of the morning. I should state, for the information of my unlearned readers (or the *lay gents*), that a bill of exceptions is given by the statute of Westminster passed in the reign of Edward I., and is an admirable check on the rashness and mendacity of judges; for it empowers the parties to put down in writing the exact terms in which the judge who tries the cause has laid down the law, and subjects him to an action if he does not acknowledge it by his seal. It then goes, by writ of error, before a superior tribunal, where his ruling is reconsidered, and may be either affirmed or reversed. On a motion for a new trial, the judge at his discretion, states verbally how he laid down the law, no averment being allowed against his statement; and the question cannot be carried before a higher court.

contemporaries in his favor, and I may go on with confidence to explain by what means he gained the high reputation which he enjoyed.

The moving power which worked such marvellous effects was his earnest desire worthily to discharge the duties of his office, that he might thereby serve his country and make his own name be remembered and honored.<sup>1</sup> Men even of great talents and acquirements have felt their ambition satisfied simply by being placed in a high judicial office, the dignity and emoluments of which they were entitled to hold for life, unless there should be an address to the Crown by the two Houses of Parliament for their removal. These considered merely how they could get on with least trouble to themselves,—taking care to avoid every appearance of recklessness which might cause open scandal and create a danger of public censure. Mansfield, with little enthusiasm in his nature, had one ruling passion, which did not work by fits, but was strong, constant, and insatiable. On the day of his inauguration as Chief Justice, instead of thinking that he had won the prize of life, he considered himself as only starting in the race.

My readers are already acquainted with some of the requisites he possessed for this noble undertaking;—his quickness of perception—his logical understanding—his scientific acquaintance with jurisprudence—his great experience in business from having been nearly twenty years at the head of his profession—his resoluteness of purpose—and his unwearied power of application. All these might have been insufficient, but he quickly showed that, seated on his tribunal, he was patient, courteous, firm, decided in his opinions, possessed of unexampled powers of despatch without ever appearing to be in a hurry, capable of explaining his judgments with admirable precision and perspicuity, and not only unswayed by awe of power or love of popularity, but free from the besetting sin of being unduly under the influence of counsel either from favor or from fear.

He began with certain reforms in the practice of his court, which I must mention as they materially contributed to his success, although their importance cannot be properly perceived by the uninitiated. His first bold step was to rescue the bar from the monopoly of the leaders. Day by day, during the term, each counsel when called upon had been accustomed to make as many motions successively and continuously as he pleased. The consequence was, that by the time the Attorney and Solicitor General, and two or three other DONS, had exhausted their motions, the hour had arrived for the adjournment; and as the counsel of highest rank was again called to at the sitting of the court next morning, juniors had no opportunity of making any motions with which

<sup>1</sup> He was not merely pleased at the moment with the occupation of trying causes, as some are with hunting and others with angling. When M. Cottu, the French advocate, went the Northern Circuit, and witnessed the ease and delight with which Mr. Justice Bayley got through his work, he exclaimed, “*Il s’amuse à juger*,” and Judge Buller used to say somewhat irreverently, “that his idea of Heaven was to sit at *Nisi Prius* all day, and play at whist all night.”



they might be intrusted till the last day of term, when it was usual as a fruitless compliment to them, to begin with the back row—after the time had passed by when their motions could be made with any benefit to their clients. The consequence was, that young men of promise were unduly depressed, and more briefs were brought to the leaders than there was time for them to read, even had they been toiling all night at their chambers instead of sitting up in the House of Commons absorbed in party struggles. Thus the interests of the suitors were in danger of being neglected, and the judges did not receive the fair assistance from the bar in coming to a right conclusion which they were entitled to expect. To remedy these evils, a rule was made that the counsel should only make one motion a-piece in rotation; and that if by chance the court arose before the whole bar had been gone through, the motion should begin next morning with him whose turn it was to move at the adjournment. The business was thus both more equally distributed and much better done.

A bad practice had prevailed, that almost all cases turning upon questions of law which came before the judges sitting *in banco* were argued two or three and even as often as four times over in successive terms, although not attended with any real difficulty—a further argument being ordered, almost as a matter of course, at the request of the party who apprehended that the inclination of the court was against him. Lord Mansfield always refused a second argument, unless the court entertained serious doubts, which were likely to be better cleared up by further discussion at the bar than by an immediate examination of the authorities and by private deliberation.

The custom likewise had been to abstain from deciding at the close of the argument,—there hardly ever being a judgment entered without several entries of *curia advisari vult*,—whereby, not only was expense increased and justice delayed, but the judges had often forgotten the reasons and authorities brought forward at the bar before publicly declaring their opinion. In *Raynard v. Chace*,<sup>1</sup> which was argued for the first time the day after Lord Mansfield took his seat on the bench, the counsels and the attorneys, who expected as a matter of course that there would be divers hearings and long consultations before the Judges would venture to pronounce their decision, were astounded to hear the new Chief Justice say that “the Court, having no doubts on the subject, considered itself bound, as well as to spare the parties the expense and anxiety of further discussion, as to terminate the suspense of others who might be interested in the question to be decided, and would accordingly proceed to give judgment at once,” But he was cautious as well as ready, and wherever the occasion required, he was eager to receive any new lights which could be thrown on obscure points of law by the researches and the ingenuity of counsel.

During Lord Mansfield's time, an evil was remedied which I am sorry to say had been revived before I was called to the bar, and, I am afraid, still inveterately exists—the delay experienced in preparing a special case or statement of the facts in evidence on a trial before a jury, when

<sup>1</sup> Burr., vol. i. p. 1.



it is found that the rights of the parties depend upon a question of law, and it is agreed that these facts shall be stated for the opinion of the judges. When such a statement is afterwards to be drawn up by the counsel on opposite sides—from their multiplied engagements, or from their indolence and love of procrastination—and still more from their pugnacity and excessive zeal to benefit and please their clients,—great danger arises of long delays and vexatious discussions before a final hearing can take place. Lord Mansfield himself dictated the statement in open court, and it was signed by the counsel before the jury were discharged. He further ordered that the case should be invariably entered for argument within the first four days of the ensuing term, so that judgment was sure to be pronounced within a few months from the time when the action was originally commenced.

He also made a general order that no cases should be postponed, even with the consent of the parties, without the express authority of the court; and cases so postponed were appointed to come on *peremptorily* at the beginning of the following term.

By these regulations, the heavy arrears which he found on taking his seat were soon cleared away; and afterwards, during the whole period of his Chief Justiceship, at the end of every term every case had been disposed of that was ripe for [A. D. 1756–1787.] being heard and decided.

But there was no complaint of precipitation or affected despatch; and, to show that the satisfactory administration of justice was the only object in view, instead of determining cases sent to the Court of King's Bench from the Court of Chancery by a written answer, simply saying *aye* or *no*, called a "certificate," Lord Mansfield introduced and continued the practice of giving an elaborate judgment on these occasions *vivà voce*, fully explaining the reasons and authorities on which his opinion was founded.<sup>1</sup>

I ought likewise to mention the improvements he introduced in the trial of causes at Nisi Prius. Hitherto it had been usual for all the counsel on each side, if they were so disposed, to address the jury, and much irregularity prevailed in examining and cross-examining the witnesses. By his care the system which we now follow was gradually matured; and, although liable to some objections, it is probably as well adapted as any that could be devised for the fair investigation of truth, as well as for celerity. According to this, the junior counsel for the plaintiff having "opened the pleadings," or stated the issues or questions of fact raised by the record for decision, the leading counsel for the plaintiff alone addresses the jury: the plaintiff's evidence follows: the defendant's leading counsel then addresses the jury, and, if he gives no evidence, the debates at the bar here close; but if there be evidence

<sup>1</sup> Lord Mansfield:—"I found it a custom in cases sent by the Court of Chancery for our opinion, to certify it privately to the Lord Chancellor in writing, without declaring in this court either the opinion itself or the reasons upon which it is grounded. But I think the custom wrong as well as unsatisfactory to the bar." (*Cowp.* 34). Lord Kenyon returned to it, however, because Lord Eldon was disposed to carp and jeer at his *reasons*.

given for the defendant, the plaintiff's leading counsel addresses the jury by way of reply. The judge then sums up, and the jury pronounce the verdict. Lord Mansfield hesitated long about making the right to reply depend upon the giving of evidence by the defendant, as thereby, to avoid a reply, important evidence is sometimes kept back, and inconvenience follows from the defendant's counsel having the privilege of speaking without any answer from his antagonist; but *his* masterly superintendence and great authority kept everything straight, and, while he presided, trial by jury in civil cases, which in theory appears so absurd, and which answers so badly in Scotland and other countries in which it is not understood, seemed a perfect invention for the administration of justice.

These are little more than matters of *procedure*, which, however wisely devised, could not of themselves have deserved any lasting praise. I now come to the principles which guided him as a judge, and which have made his name immortal.

He formed a very low, and I am afraid a very just, estimate of the Common Law of England which he was to administer. This system was not at all badly adapted to the condition of England in the Norman and early Plantagenet reigns, when it sprang up,—land being then the only property worth considering, and the wants of society only requiring rules to be laid down by public authority for ascertaining the different rights and interests arising out of land, and determining how they should be enjoyed, alienated, and transmitted from one generation to another. In the reign of George II., England had grown into the greatest manufacturing and commercial country in the world, while her jurisprudence had by no means been expanded or developed in the same proportion. The legislature had literally done nothing to supply the insufficiency of feudal law to regulate the concerns of a trading population; and the Common Law judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our code by judicial decisions. Hence, when questions necessarily arose respecting the buying and selling of goods,—respecting the affreightment of ships,—respecting marine insurances,—and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports,—which swarmed with decisions about lords and villeins,—about marshalling the champions upon the trial of a writ of right by battle,—and about the customs of manors, whereby an unchaste widow might save the forfeiture of her dower by riding on a black ram and in plain language confessing her offence. Lord Hardwicke had done much to improve and systematize Equity—but proceedings were still carried on in the courts of Common Law much in the same style as in the days of Sir Robert Tresilian and Sir William Gascoigne. Mercantile questions were so ignorantly treated when they came into Westminster Hall, and they were usually settled by private arbitration among the merchants themselves. If an action turning upon a mercantile question was brought in a court of law, the judge submitted

it to the jury, who determined it according to their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes.

The greatest uncertainty prevailed even as to the territories over which the jurisdiction of the Common Law extended. The King of this country, from having no dominions annexed to his crown out of England, except Ireland, the Isle of Man, and the Islands in the English Channel—a remnant of the duchy of Normandy,—had become master of extensive colonies in every quarter of the globe, so that the sun never set upon his empire. Some of these colonies had been settled by voluntary emigration, without any charter from the Crown; some had been granted by the Crown to be ruled under proprietary governments; some had received charters from the Crown constituting legislative assemblies; some had been ceded by foreign states under conditions as to the observance of existing laws; and some were unconditional conquests. Down to Lord Mansfield's time, no general principles had been established respecting the laws to be administered in colonies so variously circumstanced, or respecting the manner in which these laws might be altered.

He saw the noble field that lay before him, and he resolved to reap the rich harvest of glory which it presented to him. Instead of proceeding by legislation, and attempting to *codify* as the French had done very successfully in the *Coutumier de Paris*, and the *Ordonnance de la Marine*, he wisely thought it more according to the genius of our institutions to introduce his improvements gradually by way of judicial decision. As respected commerce, there were no vicious rules to be overturned,—he had only to consider what was just, expedient, and sanctioned by the experience of nations farther advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times by France, Germany, Holland, and Italy,—not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognized as governing all similar cases. Being still in the prime of life, with a vigorous constitution, he no doubt fondly hoped that he might live to see these decisions, embracing the whole scope of commercial transactions, collected and methodized into a system which might bear his name. When he had ceased to preside in the Court of King's Bench, and had retired to enjoy the retrospect of his labors, he read the following just eulogy bestowed upon them by Mr. Justice Buller, in giving judgment in the important case of *Lickbarrow v. Mason*, respecting the effect of the indorsement of a bill of lading:—

“Within these thirty years the commercial law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find that, in courts of law, all the evidence in mercantile

cases were thrown together; they were left generally to a jury; and they produced no general principle. From that time, we all know, the great study has been to find some certain general principle, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the understanding. And I should be very sorry to find myself under a necessity of differing from any case upon this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country."<sup>1</sup>

We shall see that he was equally successful in distinguishing the laws and legislation applicable to the different classes of colonies under the Crown, and that he improved our jurisprudence wherever the improvement of it, by judicial decision, was practicable; but that he failed, with some discredit, when he tried to carry his empire beyond its just limits, and attacked rules by which the descent of landed property in this country had been governed for centuries, and which, if they were inexpedient, could only be overturned by the power of parliament.

Reserving the political cases tried before Lord Mansfield to be introduced chronologically in the subsequent part of this memoir, I wish now to lay before my readers some specimens of his judgments in determining private rights. But here I am embarrassed by the riches which surround me. I have often had to lament that hardly a fragment remains to enable us to appreciate the learning and genius of judges celebrated by their contemporaries. Lord Mansfield is handed down to us by Burrow, Douglas,<sup>2</sup> Cowper, Durnford, and East, the very best law reporters that have ever appeared in England; and I am bewildered when I try to make a selection from their voluminous works.

I naturally begin with the law of INSURANCE,—almost his own creation; and I might copy the whole of a copious treatise on the subject by Mr. Justice Park, which is composed almost entirely of his decisions and *dicta*. But the bulk of my readers, being neither assurers or assured,—nor caring much about policies, valued or open,—nor about payment or return of premium,—nor about losses total or partial,—nor about perils of the seas, capture, or barratry,—nor about warranties, convoys, deviation, or abandonment,—will be contented with a taste of Lord Mansfield's reasoning upon the duty of the party effecting a policy of insurance to disclose the dangers to which the subject-matter insured may be exposed.—The governor of Fort Marlborough, in the island of Sumatra, had insured the place against capture for a year,—and it was

<sup>1</sup> 2 T. Rep. 63.

<sup>2</sup> This gentleman, when made an Irish peer by the title of Lord Glenberrie, ascribed his rise to the reputation he had acquired by reporting in Lord Mansfield's decisions; and took for his motto, "*Per varios casus.*" This is rather better than that adopted by a learned acquaintance of mine on setting up his carriage, "*Causes produce Effects,*"—which is pretty much in the style of "*Quid rides,*" for the tobaccoist; or "*Quack, Quack,*" for the doctor whose crest was a duck.



taken by Count D'Estaigne within the year, after a very gallant defence. The underwriters refused to pay, on the ground that there had not been any disclosure to them of the weakness of the fort, or the probability of its being attacked by the French :—

*Lord Mansfield*: “Insurance is a contract upon speculation. The special facts upon which the risk is to be computed lie most commonly in the knowledge of the assured only. The underwriters trust to his statement, and proceed upon confidence that he does not keep back any circumstance which they have not the means of knowing. The keeping back such a circumstance is considered a fraud, and avoids the policy, although the suppression happen by mistake ; because the risk is really different from that which they intended to take upon themselves. The policy would equally be void against the underwriters if they concealed anything exclusively within their knowledge—as, if they had learned by private information that the ship to be insured had arrived safely at her port of destination,—and they might be compelled to refund the premium which they had fraudulently received. This governing principle is applicable to all contracts. Good faith forbids either party, by concealment of what he alone knows, to draw the other into a bargain which he would certainly avoid if their information were equal. But either party may innocently be silent as to matters upon which both may equally exercise their judgment. *Aliud est celare, aliud tacere : neque enim id est celare quicquid reticeas ; sed cum quod tu scias id ignorare, emolumenti tui causa, velis eos quorum intersit id scire.*<sup>1</sup> This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favor of the party misled by his ignorance of the thing concealed. There are many matters as to which the assured may be innocently silent. He need not mention what the underwriters know, or ought to know, or may be supposed to form conjectures upon for themselves ; as, the difficulties of the voyage, the variation of the seasons, or the probability of lightning, hurricanes, and earthquakes. So the underwriters are bound to know every cause which may occasion political perils,—from the rupture of treaties and from the various operations of war, as well as the probability of safety from the continuance or return of peace, or from the imbecility of the enemy through the weakness of their councils or their want of physical resources. Men argue differently from natural phænomena and political appearances ; they have different degrees of knowledge and different capacities. But the means of information and forming a correct opinion are open to both ; so far each professes to act from his own skill and sagacity, and, therefore, neither need communicate to the other. The reason of the rule which requires disclosure is to prevent frauds, and to encourage good faith ; it is confined to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of and has no reason to suspect. The question, therefore, must always be whether there was, under all the circumstances, at the time the policy

<sup>1</sup> Cic. de Off., i. c. 12-13.

was underwritten, a fair statement, or a concealment, either fraudulent or undesigned, varying materially the risk understood to be run."<sup>1</sup>

He then went on to apply these principles, so lucidly explained, to the facts of the case; and the verdict for the plaintiff was confirmed.<sup>2</sup>

Likewise with regard to bills of exchange and promissory notes, Lord Mansfield first promulgated many rules that now appear to us to be as certain as those which guide the planets in their orbits. For example, it was till then uncertain whether the second indorsee of a bill of exchange could sue his immediate indorser without having previously demanded payment from the drawer; and it was said three Chief Justices had ruled the point one way at Nisi Prius, and as many Chief Justices had ruled it the other way:—

*Lord Mansfield*: "I cannot persuade myself that there has really been such a variety of opinions upon this question. But, however that may be, it must now be determined by the nature of the transaction, general convenience, and mercantile usage. A bill of exchange is an order on the drawee, who has, or is supposed to have, effects of the drawer in his hands to pay to the holder. When the drawee has accepted, he is the principal debtor, and due diligence against him must be used before the other parties, who are his sureties, can be held liable. Therefore, if the acceptor is not called upon when the bill is due, the drawers and indorsers are discharged. When the bill of exchange is indorsed by the person to whom it is made payable, as between indorser and indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer. The indorsee does not trust to the credit of the original drawer; he does not know whether such a person exists, or where he lives, or whether his name may have been forged. The indorser is *his* drawer, and the person to whom he originally trusted in case the drawee should not pay the money. We are, therefore, all of opinion that, to entitle the indorsee to bring an action against the indorser, upon

<sup>1</sup> Qu. how far an objection might not have been made to the validity of this insurance, on the ground that a governor ought not to be allowed to lessen his motives to do his duty in defending, to the last extremity, the place which he commands?

<sup>2</sup> *Carter v. Boehm*, 3 Burr. 1905; Sir W. Bl. 591.—Lord Mansfield infinitely improved the procedure in actions on marine policies, by introducing what is called the "*Consolidation Rule*," by which he obviated much vexation, delay, and expense, and brought the real question between the underwriters and the assured to a speedy decision on its real merits. The mysteries of this rule may not be disclosed to the profane.—He likewise did much for the improvement of commercial law in this country by rearing a body of special jurymen at Guildhall, who were generally returned on all commercial causes to be tried there. He was on terms of the most familiar intercourse with them; not only conversing freely with them in court, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisdiction by which they were to be guided. Several of these gentlemen survived when I began to attend Guildhall as a student, and were designated and honored as "*Lord Mansfield's jurymen*." One in particular, I remember, Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself.

failure of payment by the drawee, it is not necessary to make any demand on, or inquiry after, the first drawer."

He goes on to explain (which seems then to have been necessary), for the information of his brother judges, as well as of "the students," that the maker of a promissory note is in the same situation as the acceptor of a bill of exchange, and that in suing the indorser of the note it is necessary to allege and to prove a demand on the maker, fearing it might be supposed that the maker of a promissory note is not the principal debtor, and that, without any recourse against him, the indorser may at once be compelled to pay.<sup>1</sup>

There is another contract of infinite importance to a maritime people, the incidents of which had received little illustration in England since the compilation of the "Laws of Oleron," in the reign of Richard I.—I mean that between shipowners and merchants for the hiring of ships and carriage of goods. I shall notice only one of very many cases decided on this subject by Lord Mansfield. Till his time, the rights and liabilities of these parties had remained undecided upon the contingency, not unlikely to arise, of the ship being wrecked during the voyage, and the goods being saved and delivered to the consignee at an intermediate port. Lord Mansfield settled that freight is due *pro ratâ itineris*—in proportion to the part of the voyage performed—showing that this is the rule which prevails among foreign nations, and observing "Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit."<sup>2</sup>

Lord Mansfield's familiarity with the general principles of ethics, which he had acquired by an attentive study of the philosophical works of Cicero, availed him on all occasions when he had to determine on the proper construction and just fulfilment of contracts. The question having arisen, for the first time, whether the seller of goods by auction, with the declared condition that they shall be sold to "the highest bidder," may employ a "puffer,"—an agent to raise the price by bidding,—he thus expressed himself.

"The matter in dispute is of small pecuniary value, but it involves principles of the highest importance to society. The basis of all dealings ought to be good faith: so more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder. That can never be the case if the owner may secretly enhance the price by a person employed for that purpose. Yet tricks and practices of this kind daily increase, and grow so frequent that good men give into the ways of the

<sup>1</sup> *Heylyn v. Adamson*, 2 Burr. 669. Lord Mansfield had likewise to determine that the indorser of a bill of exchange is discharged if he receives no notice of there having been a refusal to accept by the drawee (*Blesard v. Herst*, 6 Burr. 2670); and that *reasonable time* for giving notice of the dishonor of a bill or note is to be determined by the Court as matter of law, and is not to be left to the jury as matter of fact, they being governed by the circumstances of each particular case. (*Tindal v. Brown*, 1 Term. Rep. 167.) It seems strange to us how the world could go on when such questions of hourly occurrence were unsettled.

<sup>2</sup> *Luke v. Lyde*, 2 Burrow, 883.

bad, and become dishonest in their own defence. But the right now claimed was never before openly avowed. An owner of goods set up for sale at an auction would not bid in the room for himself. Speedily after such a bid the owner and the auctioneer would be the only persons present; and if it were discovered that there were puffers bidding, there would be the same dispersion. The practice is a fraud upon the sale, and upon the public. I cannot listen to the argument that it is a common practice.<sup>1</sup> Gaming, stock-jobbing, and swindling are all very common; but the law forbids them all. The very nature of a sale by auction is that the goods shall go to the highest real bidder; the owner violates his contract with the public if, by himself or his agent, he bids upon his goods, and no subsequent bidder is bound to take the goods at the price at which they are knocked down to him."<sup>2</sup>

Lord Mansfield gave earnest of his power to deal with questions of colonial law in deciding that certain English statutes passed in the reigns of Richard II. and Edward VI. do not extend to Jamaica, which had been conquered from Spain by Cromwell, and, having been abandoned by the Spanish inhabitants, had been re-settled by English emigrants:—

"If Jamaica is considered as a conquest," said he, "it would retain its ancient laws till the conqueror thought fit to alter them. If it be considered as a colony which we have planted (as it ought to be, the old inhabitants having left the island), then these statutes are positive regulations of police not adapted to the circumstances of a new colony, and therefore no part of that law of England which colonists are supposed from necessity to carry with them to their new abode. No act of parliament made after a colony is planted is construed to extend to it without express words to that effect."<sup>3</sup>

But it was in the case of *Campbell v. Hall*<sup>4</sup> that he fully developed the law upon this subject, and explicitly laid down the rules upon which our colonies have been governed ever since.

The island of Grenada having been taken by us in the Seven Years' War, and ceded to us by the peace of 1762, the King, in a proclamation issued in 1763, of his own authority, imposed a tax of 4 per cent. on all exports; and the action was brought in the Court of King's Bench in England by the plaintiff, a British subject, who had subsequently purchased an estate and settled in the island, to recover back the sum he had been compelled to pay under this imposition for liberty to ship his sugars to be carried to London; he maintaining that such a tax could only be imposed by the authority of Parliament. Lord Mansfield thereupon laid down the six following propositions:—

<sup>1</sup> It is very gravely urged, as their chief argument, by those who are for permitting marriages between widowers and the sisters of their deceased wives, that such marriages are common, although they might reason in the same manner for the legalising of bigamy.

<sup>2</sup> *Bezwell v. Christie*, Cowp. 395. This rule was ratified by Lord Kenyon in *Howard v. Castle*, 6 T. R. 642., and has ever since been acted upon. But, by the conditions of sale, the owner may expressly reserve the power of making a bid by his agent.

<sup>3</sup> *Rex v. Vaughan*, 4 Burr. 2494.

<sup>4</sup> Cowp. 204.



"1. A country conquered by the British arms becomes a dominion of the King in right of his crown; and therefore necessarily subject to the legislature—the parliament of Great Britain. 2. The conquered inhabitants, once received under the King's protection, become subjects, and are universally to be considered in that light; not as enemies or aliens. 3. The articles of capitulation upon which the country surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. 4. The law of every dominion annexed to the crown equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise therein. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives. 5. The laws of a conquered country continue in force until they are altered by the conqueror. The absurd exception as to Pagans mentioned in *Calvin's Case* shows the universality and antiquity of the maxim; in all probability it arose from the mad enthusiasm of the Crusades. 6. The last proposition is, that if the King (and when I say the King, I always mean the King without the consent of Parliament) has a power to alter the old and introduce new laws in the conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any change contrary to fundamental principles; he cannot exempt an individual in that dominion from the power of Parliament, or give him privileges exclusive of his other subjects." The learned judge gives a clear opinion in favour of the legality of the proclamation:—"It is left by the constitution to the King's authority to accept or refuse a capitulation; if he refuse, and puts the inhabitants to the sword or exterminates them, all the lands belong to him; if he receives the inhabitants under his protection, and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making terms of peace; he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed; neither has it been hitherto controverted that the King may change part or the whole of the law or political form of government of a conquered dominion."—He then draws an illustration from the "history of the conquests made by the Crown of England," reasoning in a manner which was highly distasteful to the "sister kingdom," and which no English judge would have ventured upon after the year 1782: "The conquest and the alteration of the laws of Ireland have been variously and learnedly discussed by lawyers and writers of great fame at different periods of time; but no man ever said the Crown could not do it. The fact, in truth, after all the researches which have been made comes out clearly to be as it is laid down by Lord Chief Justice Vaughan,<sup>1</sup> that 'Ireland receives the laws of England by the charters and commands of Henry II., King John, Henry III., (he adds an) ' &c.' to take in Edward I. and the subsequent kings; and he shows clearly the mistake of imagining that the charters of the 12th of John were by the assent of a Parliament

<sup>1</sup> Vaughan's Rep. 292.

of Ireland. Whenever the first parliament was called in Ireland, that change was introduced without the interposition of the Parliament of England, and must therefore be derived from the Crown." He proceeds with Wales, Berwick, Gascony, Calais, Gibraltar, Minorca, and New York, placing them all on the same footing, and showing the power of the King over them to be absolute till he had renounced it or modified it:—"It is not to be wondered at," he observed, "that an adjudged case in point has not been produced. No question was ever started before but that the King has a right to legislative authority over a conquered country; it was never denied in Westminster Hall; it never was questioned in Parliament. Coke's report of the arguments and resolutions of the Judges in *Calvin's* case lays it down as clear: 'If a king comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot, without the consent of parliament.' It is plain that he alludes to his own country, because he speaks of a country in which there is a parliament. In the year 1722, the Assembly of Jamaica being refractory it was referred to Sir Philip Yorke and Sir Clement Wearge (great names) to know 'what could be done, if the Assembly should obstinately continue to withhold the usual supplies?' They reported thus: 'If Jamaica is still to be considered as a conquered island, the King has a right to lay taxes upon the inhabitants; but if it is to be considered in the same light as the other plantations, no tax can be imposed on the inhabitants but by an assembly of the island, or by an act of parliament.' On the other side, no book, no saying, no surmise has been cited, and in our annals a doubt upon the subject has never been entertained."

However, having so set up the prerogative of the Crown, he went on to show that in this instance it had been waived by a prior proclamation for the settling of the government of Grenada and other conquests, directing the governors to convene general assemblies with power to make laws for the government of those colonies, agreeable, as near as might be, to the laws of England, and by a commission actually issued appointing a governor of Grenada, and authorising him to summon an assembly to make laws as soon as the state and circumstances of the island would permit. Such grants being irrevocable, although not acted upon, Grenada was pronounced to be in the same situation as Jamaica, so that the royal proclamation imposing the tax was void, and judgment was given for the plaintiff.

A very interesting question, turning on general principles of jurisprudence, arose before Lord Mansfield, whether an action could be maintained in our courts by an alien enemy upon a ransom bill, or security for a certain proportion of the value of a ship and cargo taken by a privateer and released? As usual, in such cases, he took the liberal side, saying,—

"Ransom bills are to be encouraged as lessening the horrors of war. Justice ought to be administered to foreigners in our courts in the most extensive and generous manner; because the Crown cannot here inter-

pose as in absolute monarchies to compel the subject to do justice in an extra-judicial manner.”<sup>1</sup>

Judgment was given for the plaintiff; and the same doctrine was laid down even in a case where the capturing ship with the ransom bill on board had been captured by an English cruiser,—Lord Mansfield saying, “It is sound policy as well as good morality to keep faith with an enemy in time of war: although the contract arose out of a state of hostility, it is to be governed by the law of nations and the eternal rules of justice.”<sup>2</sup> But ransom bills are now forbidden by act of parliament.<sup>3</sup>

Although the respective powers and privileges of those possessing, and being subject to, the authority of government at home had been well defined, at least since the Revolution of 1688, great doubts still existed with respect to cases of this sort arising in the dominions of the Crown beyond the seas. Lord Mansfield was of essential service in establishing the grand maxim that a British subject is under the protection of the constitution wherever the British flag is unfurled all over the globe. While Minorca was in our possession, General Mostyn, the governor, in a very arbitrary manner, arrested Signor Fabrigas, a native of the island, and without any just cause confined him in a dungeon. The injured man followed the oppressor to England, after the expiration of his government, and brought an action of trespass and false imprisonment against him in the Court of Common Pleas. The jury found a verdict for the plaintiff, with 3000*l.* damages; but a bill of exceptions was tendered to the direction of the presiding judge, who held that the action was maintainable,—and this came, by writ of error, before the Court of King’s Bench. The case, on account of its extraordinary importance, was argued several times, two grand points being made for the defendant: 1. That the plaintiff could not sue in an English court of justice, having been born before the Peace of Utrecht, out of the allegiance of the English crown, when Minorca with the other Balearic Islands belonged to Spain: and, 2. That no action could be maintained against the defendant in a British court of justice for any of his acts in Minorca, as, although he might be impeached in parliament, there was no remedy against him in a court of law for any thing he had done in his capacity of governor.”<sup>4</sup>

*Lord Mansfield*: “It is impossible there ever should exist a doubt but that a subject born in Minorca has as good a right to appeal to the King’s courts of justice at Westminster as any one who was born within the sound of Bow-bell; and the objection made in this case, of its not being stated on the record that the plaintiff was born since the Peace of Utrecht, by which Minorca was ceded to this country, is untenable, for

<sup>1</sup> *Cornu v. Blackburn*, Doug. 640.

<sup>2</sup> *Anthou v. Fisher*, Doug. 649, n.

<sup>3</sup> Stat. 22 Geo. III. c. 25.

<sup>4</sup> Buller, then at the bar, concluded a very able argument for the plaintiff by observing that if the verdict against Governor Mostyn should be set aside, it would be said of him—

“Hic est damnatus inani iudicio;”

and of the Minorquins,

“At tu, victrix provincia, ploras.”

from the moment of the cession all the inhabitants of the island were under the allegiance, and were entitled to the protection of the British Crown. But, then, we are told of the *sacredness* of the defendant's person as *governor* : and it is insisted by way of distinction, that supposing the action will lie for an injury of this kind committed by one individual against another in such a dominion beyond the seas, yet it shall *not emphatically* lie against the governor. In answer to which I say, that, for many reasons, if it did not lie against any other man, it shall *most emphatically* lie against the governor. For it is truly said, that a governor is in the nature of a viceroy ; and therefore locally during his government, no civil or criminal action will lie against him, because, upon process, he would be liable to imprisonment. Emphatically, the governor must be tried in England, to see whether he has lawfully executed the authority delegated to him, or whether he has abused it in violation of the laws of England and of the trust reposed in him. The defendant, by being tried here, is not deprived of any means of proving his innocence. He might show that he only did what the public safety required, or that he acted as the Spanish governor might have done. The way of knowing foreign laws is by admitting them to be *proved as facts*, and the judge must assist the jury in finding what they really ordain. If the governor of a foreign possession is accountable in this country, he is accountable in this court. Complaints made to the King and Council tend to remove the governor ; but when he has ceased to be governor, they have no jurisdiction to make reparation by giving damages, or to punish him in any shape for any wrong which he may have committed. The monstrous proposition that a governor acting by virtue of letters patent under the great seal is accountable only to God and his own conscience, that he is absolutely despotic, and can despoil those under his rule both of their liberty and property with impunity, is abhorrent to the principles of natural justice, and is contrary to the law of England, which says to all the King's subjects 'whensoever or wheresoever you are wronged, you shall have a remedy.'—Judgment affirmed.<sup>1</sup>

But Lord Mansfield said, 'The true maxim is, '*Boni judicis ampliare justiam*,' not '*ampliare jurisdictionem*.''' He therefore carefully considered to what various tribunals the constitution assigned the determination of various forensic questions ; and, not being misled by love of popularity or love of power while deluding himself with the notion that he only wished to vindicate the rights of all suitors who came before him, he did not endeavor to encroach upon the jurisdiction either of the two Houses of Parliament or of the inferior courts. A tempting occasion arose of securing to himself the acclamations of the mob as "a truly British judge" when several actions came for trial before him, brought by sailors on board a merchant ship which had been captured by a *letter of marque* as a prize, but liberated by the Court of Admiralty, the plaintiffs contending that the captain of the *letter of marque* was liable to be sued by them in a court of law for the false imprisonment which they had undergone. But he clearly held that the actions could not be maintained,

<sup>1</sup> Cowper, 161.



as the question of "prize, or no prize," was properly triable only before the Court of Admiralty, and it belonged to that court alone, upon the unjust capture of a ship as prize, to award damages and costs against the captor to all who have suffered by his wrongful act.

"This," said he, "is a new attempt, which, if it succeeded, would destroy the British navy. If an action at law should lie by the owners and every man on board a ship taken as prize against the captor and every man on board his ship, the sea would be safe for the trade of our enemies, however great our naval superiority. I am bound to suppose that the Court of Admiralty has done ample justice, according to the power it possessed and the duty imposed upon it, between all these parties."<sup>1</sup>

So, when a mandamus was applied for to compel the benchers of Gray's Inn to call a person to the bar, instead of wishing to convert this writ into an instrument by which the whole scope of the executive government might be brought within the cognizance of the judges of the King's Bench, and they might issue orders to the King himself and all in authority under him, he very properly refused to interfere, saying, "The power of admitting persons to practise as barristers is vested in the benchers of the Inns of Court, subject to visitorial power; and if the applicant is wronged, he must apply elsewhere for a remedy."<sup>2</sup>

I ought to mention, however, that, misled by an old precedent, he fell into a mistake in holding that an action-at-law could be maintained to recover a legacy."<sup>3</sup>

PRECEDENT and PRINCIPLE often had a hard struggle which should lay hold of Lord Mansfield; and he used to say that he ought to be drawn placed between them, like Garrick between TRAGEDY and COMEDY. Though he might err, like all other mortals, where there was no fixed rule of law which could not be shaken without danger, he was guided by a manly sense of what was proper, and he showed that he considered "law a rational science, founded upon the basis of moral rectitude, but modified by habit and authority." Thus, a notion had long prevailed that if a ship was cast away, and no man or animal came ashore alive, the wreck belonged to the King or his grantee, because the statute 3 Edward I. c. 4, enacts that "it shall *not* be a wreck if man, dog, or cat escape alive." A lord of a manor having brought an action for property wrecked when all on board had perished, dogs and cats included, but the property was clearly identified by the original owners, he said,—

"The doctrine contended for is contrary to the principles of law, justice and humanity. The very idea of it is shocking. The coming

<sup>1</sup> 2 Evans, 149; *Lindo v. Rodney*, Doug. 613.

<sup>2</sup> *Rex v. Benchers of Gray's Inn*, Doug. 353.—I hope that the system which has prevailed satisfactorily may long continue; but if ever the Inns of Court should make arbitrary rules for the government of their members, and should enter into a contest for students, by abridging the period of study and relaxing the regulations for the exclusion of improper candidates, it will be necessary for the legislature to interpose, and to establish a uniform and efficient discipline by way of preparation for a profession of such importance to the community.

<sup>3</sup> *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Cowp. 289; *Deeks v. Strutt*, 5 Term Rep. 690.

to shore of a dog or cat alive can be no better proof than if they should come ashore dead. The escaping alive makes no sort of difference. If the owner of the dog, or cat, or other animal, was known the presumption of the goods belonging to the same person would be equally strong whether the animal breathed or not. It was only when no owner could be found that, by common law, the goods belonged to the King; and the statute is only declaratory of the common law. It does not enact that, if neither man, cat, or dog escape alive, the wreck shall belong to the King. The owner was only required to show that the property was his *per certa indicia et signa*, and animals were mentioned by way of instance. Anciently, goods sent by sea probably were not distinguished by marks and numbers so accurately as at the present day, and then a dog or a cat might afford a presumption towards ascertaining the owner of the goods. The goods in question are proved to have been the property of the defendant; and, after this attempt to seize them, the plaintiff may betake himself to the trade of a wrecker on the Cornish coast.”

—*Judgment for the defendant.*<sup>1</sup>

Lord Mansfield first established the grand doctrine that the air of England is too pure to be breathed by a slave. James Somersett, a negro, being in a state of slavery in Africa, was carried from thence to Jamaica, where, by law, slavery was permitted, and there sold as a slave. Mr. Steuart, his master, brought him over to England, intending soon to return with him to Jamaica. While confined on board a ship in the river Thames, that he might be carried back, he claimed his freedom, and, being brought up under a writ of *habeas corpus*, the court had to determine whether he was entitled to it.

On behalf of his master it was argued, that villeinage, or slavery, had been permitted in England by the common law; that no statute had ever passed to abolish this *status*; that although *de facto* villeinage by birth had ceased, a man might still make himself a villein by acknowledgment in a court of record; that at any rate the rights of these parties were to be decided according to the law of Jamaica, where they were domiciled, and as there could not be the smallest doubt that the voyage to England did not amount to emancipation, so that if Somersett were again in Jamaica he would still be considered the property of his master, the relation between them could not be considered suspended in England. Various instances were stated in which negro slaves, brought over here from the West Indies, had been carried back again against their will by their masters; and *dicta* of Lord Talbot and Lord Hardwicke were cited, to the effect that this might lawfully be done.

*Lord Mansfield*: “I am quite clear that the act of detaining a man as a slave can only be justified by the law of the country where the act is done, although contracts are to be construed according to the law of the country where they are entered into, and the succession to personal property according to the law of the country where the deceased owner was domiciled at the time of his death. Then what ground is there for saying that the *status* of slavery is now recognized by the law of Eng-

<sup>1</sup> *Hamilton v. Davis*, 5 Burr. 2732.

land? that trover will lie for a slave? that a slave market may be established in Smithfield? I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle. The dicta cited were probably misunderstood; and, at all events, they are to be disregarded. Villeinage, when it did exist in this country, differed in many particulars from West India slavery. The lord never could have thrown his villein, whether *regardant* or in *gross*, into chains, sent him to the West Indies, and sold him there to work in a mine or in a cane-field. At any rate, villeinage has ceased in England, and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered, and whatever may be the color of his skin:

‘Quamvis ille niger quamvis tu candidus esses.’

Let the negro be discharged.”<sup>1</sup>

But Lord Mansfield gives a clear opinion in favor of the legality of pressing mariners for the royal navy, saying that “the practice was not only essential for the safety of the state, but had existed from the remotest antiquity, was supported by judicial decisions, and was even incidentally recognized by acts of parliament.” He observed, that “a pressed sailor is not a slave; no compulsion can be put upon him except to serve his country; and, while doing so, he is entitled to claim all the rights of an Englishman.”<sup>2</sup>

Happily the law is at last settled by the legislature upon the footing for which I had long contended, that “no action can be maintained on a wager;” but it is still curious to see how such a judge as Lord Mansfield disposed of cases of this sort, when the general rule, subject to exceptions, was, that a wager might be enforced like any other contract. A party, bringing by appeal to the House of Lords a decree in Chancery which had been pronounced against him, laid a wager that the decree would be affirmed. The decree being reversed, he refused to pay the wager; and an action being brought against him, he argued—1. It is essential to the validity of a wager that the event be contingent, but the law of the country must be taken to be clear, evident, and certain, inasmuch that the reversal of this decree was as little doubtful as that a stone will fall to the earth by the force of gravitation. 2. At all events, a wager respecting a judicial proceeding is illegal and void, as contrary to public policy.

*Lord Mansfield*: “This contract is equal between the parties; they have each of them equal knowledge and equal ignorance; and it is concerning an event which—reasoning by the rules of predestination—is, to be sure, so far certain, as it must be as it should afterwards happen to be. Touching the certainty of the law, it would be very hard upon the profession if it were so certain that everybody knows it: the misfortune is that it is so uncertain, that much money must be paid before we can find it out, even in the court of last resort. Then I cannot say that

<sup>1</sup> See 20 St. Tr. 1—82.

<sup>2</sup> *Rex v. Tubbs*, Cowp. 512.

this wager is against sound public policy. A parson, who wanted to be made a bishop, conversing with the Prime Minister respecting a see then vacant, said 'I will bet you so much (naming a good round sum) that I have not the bishopric.' This was a mere disguise to purchase it, and the contract manifest corrupt and void. So, if the present wager had been made with one of the judges or one of the peers who were to give an opinion on the validity of the decree, it would have been construed as a bribe. But this transaction, as far as I can see, contains nothing immoral, or contrary to justice, and I do not think that we can prevent the plaintiff from recovering the money he has won."—*Judgment for the plaintiff*.<sup>1</sup>

Mr. Codrington and Mr. Pigott, two licentious young men,—celebrated characters on the turf,—being heirs to great estates, agreed to wager a large sum upon the survivorship of their respective fathers, or, as it was termed "to run their fathers." The former, however, feeling some little remorse, Lord March, afterwards Duke of Queensbury,<sup>2</sup> agreed to stand in his place, and mutual notes were given for the payment of the sum staked. It turned out that Mr. Pigott's father was at that time actually dead, of which neither party had any knowledge or suspicion. Lord March now brought an action on the wager, which the counsel for the defendant insisted was illegal and void.

*Lord Mansfield*: "The question is, what the parties really meant? The material contingency was, which of the two young heirs should come to his father's estate first? It was not known that the father of either of them was then dead. All circumstances show that, if this possibility had been thought of, it would not have made any difference in the bet, and there is no reason to presume that they would have excepted it. The intention was, that he who came first to his estate should pay the sum of money to the other, who stood in need of it. That the event had happened was in the contemplation of neither party. The contract was fair; and, by the just interpretation of it, the plaintiff is entitled to recover."<sup>3</sup>

But he held that a wager between two voters, respecting the event of an election for members of parliament, was illegal:—

*Lord Mansfield*: "Whether this particular wager had any other motive than the spirit of gaming and the zeal of both parties, I do not know; but our determination must turn on the species and nature of the contract; and if that is, in the eye of the law, corrupt, and against the fundamental principles of the constitution, it cannot be supported by a court of justice. The law declares that the elector of a member of parliament shall be free from pecuniary influence in giving his vote. This is a wager, in the form of it, between two voters, and the event is the success of one of the rival candidates. The success of either candidate is material; and, from the moment the wager is laid, both parties are fettered. It is, therefore, laying them under a pecuniary influence.

<sup>1</sup> *Jones v. Randall*, Cowp. 37.

<sup>2</sup> Whom I remember when he was called "old Q.," sitting in his balcony in Piccadilly, looking through an opera-glass at the ladies as they passed by.

<sup>3</sup> *Earl of March v. Pigott*, 5 Burr. 2804.



What is so easy as, in a case where a bribe is intended, to lay a wager ? It is difficult to prove that the wager makes the elector give a contrary vote to what he would otherwise have given, but it has a tendency to influence his mind. Therefore, in the case respecting a decision of the House of Lords, if the wager had been laid with a lord of parliament or a judge, it would have been void from its tendency, without considering whether a bribe was really intended or not.”—*Judgment for the defendant*.<sup>1</sup>

I shall close this head with the celebrated wager upon the sex of the CHEVALIER D'EON. He had served as a military officer, had acted as a diplomatist, and had fought duels, but his appearance was very effeminate ; and after he had resided some years in England, frequenting race-courses and gaming-houses in male attire, Mr. Dacosta wagered a large sum with Mr. Jones that the supposed Chevalier was a woman, and brought an action to recover the amount. The case coming on before Lord Mansfield at *nisi prius*, he allowed the trial to proceed, and, after many witnesses had been examined, the jury found a verdict for the plaintiff. But the case was subsequently brought before the whole court,—when, the verdict being admitted to be according to the fact, the question was learnedly discussed whether the action was in point of law maintainable ?

*Lord Mansfield* : “ The trial of this cause made a great noise all over Europe ; and, from the comments made upon it, and farther consideration, I am sorry that I did not at once yield to the consideration that it led to indecent evidence, and was injurious to the feelings and interests of a third person. I am sorry, likewise, that the witnesses subpœnaed had not been told they might refuse to give evidence if they pleased. But no objection to their being examined was made by the counsel for the defendant ; nor did any of themselves apply for protection, or hesitate to answer. I have since heard that many of them had been confidentially employed by the person whose sex was in controversy in the way of their profession or business. That any two men, by laying a wager concerning a third person, may compel his physicians, servants, and relations to disclose what they know about his person, would have been an alarming proposition. Mere indecency of evidence is no objection to its being received when it is necessary to the decision of a civil right or criminal liability. Upon this ground we think that Mr. Justice Burnet was wrong in refusing to try the case before him where a young lady brought an action of slander for saying that she had a defect in her person which unfitted her for marriage, and the defendant alleged in his plea that she had such a defect ; for there, if the statement was false, the plaintiff had received a grievous injury, for which she was entitled to exemplary damages ; and if it was true, the defendant ought to have been freed from the charge of a malicious lie, however he might still be liable to censure for indelicately proclaiming the truth. But if it had been merely an action on a wager whether the young lady had such a defect, it would have been nearly the present case, and I think the judge

<sup>1</sup> *Allen v. Hearn*, 1 Term Rep. 57.

would have been well justified in refusing to proceed with the trial ; or, declaring that the supposed contract was void, in instantly nonsuiting the plaintiff. Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country. Whether it would not have been better to treat all wagers as gaming contracts, and to have held them void, it is now too late to discuss ; but there are exceptions to the rule, on the ground of injury to the community or to individuals. Suppose a wager between two men, that one of them, or that a third person, shall do some criminal act. Suppose I lay you a wager that you do not beat such a person ; you lay that you will. Suppose a wager that the act shall be repeated in Covent Garden, for which Sir Charles Sedley was prosecuted. Would a court of justice try any of these wagers, tending to crime and immorality ? We are told that the objection is not supported by adjudged cases ; but I say you offend, you misbehave, by laying such a wager. Upon such a wager would a court of justice try whether a married woman has committed adultery, or an unmarried woman has had a child ? The party to be affected would have a right to say, ‘How dare you bring my name in question ?’ If a husband complain of adultery, he shall be allowed to try it, for he is a party interested and aggrieved. So, upon a right to the inheritance of a freehold estate, it may be necessary to try whether the claimant’s mother was married before his birth. But third persons shall not, by laying a wager wantonly, expose others to odium or ridicule.—We come to the present case. Here is a person who represents himself to the world as a man, is stated on the record to be *Monsieur le Chevalier d’Eon*, has acted in that character in a variety of capacities, and has his reasons and advantages in so appearing. Shall two indifferent people, by a wager between themselves, try whether he is a cheat and impostor, and be allowed to subpoena all his intimate friends and confidential attendants to give evidence that will expose him all over Europe ? Such an inquiry is a disgrace to judicature. If the Chevalier had applied to the Court and said, ‘Here is a villainous wager laid to injure me ; I, as a stranger, whose interest it affects, pray you to stop it,’ we should instantly have done so. We have no authority to declare all wagers illegal ; a wager whether the next child shall be a boy or a girl hurts no one. But are we to lay down doctrine which would give validity to a wager whether a young woman has a mark upon a particular part of her body, and authorize the calling of her chambermaid to prove it ? The present wager, being indecent in itself, and manifestly a gross injury to a third person, is not to be endured.”—*Judgment for the defendant*.<sup>1</sup>

<sup>1</sup> *Dacosta v. Jones*, Cowp. 729. Although the verdict was set aside on legal grounds, it was allowed to settle many other bets which had been laid on the same question. The Annual Register for 1766, p. 167, says, “By this decision, no less a sum than 75,000*l.* will remain in this country which would otherwise have been transmitted to Paris. The Chevalier has left England, declaring that she had no interest whatever in the policies opened on her sex.” The Chevalier, then assuming female attire, remained in France, supported by a pension from the French government for having been long a spy of Louis XV., till the breaking

Lord Mansfield most usefully asserted the power of the common law to punish those who are guilty of offences *contra bonos mores*, although there may not have been any prior prosecution for the specific offence. An application was made against Sir Francis Blake Delaval, one Bates a music master, and others, for a conspiracy to corrupt the chastity of a young female. This person, at the age of fifteen, was bound apprentice to Bates, to be instructed in the musical art; and being possessed of great beauty as well as musical genius, she attracted the notice of Sir Francis, then a fashionable libertine of much notoriety. She was assigned over to him for the sum of 200*l.*, which Bates received by the hands of his tailor, and then she was introduced to him *to learn music*, and she was made to covenant that she would live with him as his apprentice, and that she would not quit his apartment. Having thus got possession of her, he paraded her about in public places as his mistress. The counsel for the defendants contended that, however immoral their conduct had been, they were not guilty of any offence cognizable in a criminal court.

*Lord Mansfield*: "It is true that many offences of the incontinent kind are to be considered as *sins* only, and must be left to the conscience of the offender, or penance to be imposed by the Ecclesiastical Court *pro salute animæ*. But this Court has the superintendence of offences *contra bonos mores*, and a *conspiracy* to corrupt the innocence of a young female is an offence which may be made the subject of an information or indictment, and which we can visit with fine and imprisonment or infamous punishment. If Sir Francis Delaval had merely seduced this unfortunate girl by his own solicitations, he might only have been liable to an action for damages at the suit of her father; but entering into a wicked bargain by which he has purchased her from another, the two must be considered as *conspiring* to ruin her, and they are both guilty of a misdemeanor. Let the rule for filing a criminal information against them be absolute."<sup>1</sup>

Lord Mansfield acquired great popularity by this declaration of the law, which gave a salutary check to the abominable practices of the plotters against female innocence; but he incurred much obloquy by his direction to the jury in the great *crim. con.* cause of the *Earl of Grosvenor v. His Royal Highness the Duke of Cumberland*. The plaintiff's counsel having urged the exalted rank of the defendant as a ground for heavy damages, the Judge said that "the rank of the defendant was wholly immaterial; that they should consider the cause as if it were between A. and B.; and that they were merely to give the

out of the Revolution in 1790. He then came to England, and, being in great distress, lived with a lady of reputation as her companion; but, dying in the year 1810, was found, on a post-mortem examination, to be indeed of the sex which he had originally claimed, and, in all respects, perfectly formed.

<sup>1</sup> Holliday, 214. I wish that those who, for several years past, have been bringing forward bills "for the protection of females" would be contented with the law as laid down here, and abandon their well-meant but injudicious attempts. Where there is a *conspiracy*, the law is already strong enough to punish; and a simple departure from the rules of chastity cannot be made the subject of criminal legislation.

plaintiff a compensation for the loss of his wife's society—this loss not being lessened or enhanced by the consideration whether the wrong-doer was a peasant or a prince.” We may safely acquit him of all corruption and sycophancy in this direction; and it is somewhat countenanced by the converse proposition of an eminent judge in a similar action which a nobleman brought against his coachman, and in which the jury gave 10,000*l.* damages. But it is quite at variance with the usual evidence in these cases that the defendant is a man of large property, and in reality the disgrace and sufferings of the plaintiff may be much greater from the consideration that the destroyer of his domestic happiness is nearly related to the throne.<sup>1</sup>

On the great question of literary property, on which, for the first time after Lord Mansfield presided in the Court of King's Bench, the judges were divided, he particularly distinguished himself, contending on (I think) unanswerable grounds that, by the common law, an author, after printing and publishing his work, is entitled to prevent others from reprinting and publishing it without his leave,—which would amount to a perpetual copyright in him and his family. The three puisnies began; WILLES and ASTON *pro* and YATES *contrà*.

*Lord Mansfield*: “This is the first instance of a final difference in this Court since I sat here. Every order, rule, judgment, and opinion has hitherto been unanimous. That unanimity never could have happened if we did not, among ourselves, communicate our sentiments with great freedom; if we did not form our conclusions without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons. We have all equally endeavored at that

<sup>1</sup> 2 Evans, 359. Junius took good advantage of this direction, in his Letter to Lord Mansfield:—“An action for criminal conversation being brought by a peer against a prince of the blood, you were daring enough to tell the jury that, in fixing the damages, they were to pay no regard to the quality or fortune of the parties; that it was a trial between A. and B.; that they were to consider the offence in a moral light only, and give no greater damages to a peer of the realm than to the meanest mechanic. I shall not attempt to refute a doctrine which, if it was meant for law, carries falsehood and absurdity upon the face of it, but, if it was meant for a declaration of your political creed, is clear and consistent. Under an arbitrary government, all ranks and distinctions are confounded. The honour of a nobleman is no more considered than the reputation of a peasant; for, with different liveries, they are equally slaves.” The bad law of the Judge, however, was soon forgotten, amid the ridicule excited by the correspondence of the lovers. “Their letters,” says Horace Walpole, “were produced at the trial, and never was the public regaled with a collection of greater folly! Yet to the lady's honor be it said, that, bating a few oaths which sounded more masculine than tender, the advantage in grammar, spelling, and style was all in her favor. His Royal Highness's diction and learning scarce excelled that of a cabin-boy, as those elegant epistles existing at present may testify. Some, being penned on board of ship, were literal verifications of Lord Dorset's ballad,—

“To you fair ladies now on land,  
We men at sea do write;  
But first would have you understand  
How *hard* 'tis to indite.”

(Mem. Geo. III., iii. 104.) One of these effusions thus began:—

“Hear I am all by myself at sea!”



unanimity upon this occasion; we have talked the matter over many times; I have communicated my thoughts in writing, and I have read the three arguments which have just been delivered. In short, we have equally tried to convince or to be convinced. But in vain: we continue to differ, and, whoever is right, each is bound to abide by and deliver that opinion which he has deliberately formed."

I can only introduce a few of the observations by which he so ably availed himself of the concession, that the author, before publication by himself, could prevent it being published by another; and met the metaphysical reason, that there can be no property in that which cannot be perceived by the senses:—

"It has all along been expressly admitted, that by the common law an author is entitled to the copy<sup>1</sup> of his own work until it has been once printed and published by his authority. The property in the copy thus limited is equally an incorporeal right as much as that contended for, to present a set of ideas communicated in a set of words by conventional characters. It is equally detached from the manuscript, or any other physical existence whatsoever. The property, whether limited or extended, is equally incapable of being violated by crime indictable, and is only violated by another's printing without the author's consent, which is a civil injury. The remedy is the same by an action on the case for damages, or a bill in equity for specific relief. No action of detinue, trover, or trespass *vi et armis*, lies; for the limited property is equally a property in notion, and has no corporeal, tangible substance. No disposition, no transfer of the paper upon which the composition is written, marked or impressed, though it gives the *power* to print and publish, can be construed a conveyance of the *right* to do so, without the author's express consent, much less against his will. Dean Swift was certainly proprietor of the paper upon which Pope's letters were written. I know that Mr. Pope had neither the original nor any transcript of them, and that he had only a very imperfect memory of their contents. Yet the Lord Chancellor held that he was entitled to stop the publication of them by a printer into whose hands they had fallen. If the *copy* belongs to an author after publication, it certainly belonged to him before. But if it does not belong to him after, where is the common law which says there is such a property before? All the metaphysical subtleties from the nature of the thing may be equally objected. It is incorporeal. It relates to ideas detached from any physical existence. It has none of the *indicia* of property. The same string of questions may be asked upon the right before publication. Is it real or personal? Does it go to the heir or executor? Is it assignable or not? Can it be forfeited? Can it be taken in execution? Can it be vested in the assignees of a bankrupt? The common law as to *copy* before publication cannot be founded upon custom; as, till the injunction in 1732 against Curl publishing Mr. Pope's letters, the case of piracy before publication never existed;

<sup>1</sup> He had explained that he used "*copy* in the technical sense in which it had been used for ages, to signify the incorporeal right to the sale, printing, and publishing of somewhat intellectual, communicated by letters."

it never was put or supposed. From what source, then, is the common law drawn which is admitted to be so clear in respect to the *copy* before publication? We are told, because it is just that an author should reap the pecuniary profits of his own ingenuity and labor; it is just that another should not use his name without his consent; it is fit that he should judge when to publish, or whether he will ever publish; it is fit that he should not only choose the time but the manner of the publication—how many volumes—what number of copies—what paper—what print: it is fit he should choose to whose care he will trust the accuracy of the impression, and to whose honesty,—that interpolations may not be foisted in. These considerations, I allow, are sufficient to show that it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the *copy* before publication. But the same considerations hold with equal strength after the author has published. He can reap no pecuniary profit if the next day his work may be pirated upon worse paper, and in worse print, and at a lower price. The author may not only be deprived of any profit, but be ruined by the expense he has incurred. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. Any one may print, pirate, perpetuate, aggravate his imperfections, and may propagate sentiments under his name which he never entertained, or, upon more deliberation, disapproves, repents, and is ashamed of. For these reasons it seems to me equally just and fit to protect the *copy* after publication. The general consent of this kingdom for ages is on the affirmative side. The legislative authority has taken it for granted, and interposed penalties to give it additional protection for a time. The single opinion of such a man as Milton, speaking after much consideration on the very point, is much stronger than any fanciful analogies from gathering acorns, or acquiring a right to a field by possession, where the writers referred to, instead of having this question in contemplation, speak of an imaginary state of nature before the invention of letters.”

The pure common-law right was never finally decided; for the case being brought by writ of error before the House of Lords, their Lordships, by the advice of Lord Chancellor Camden, determined that “whatever the right of the author might be at common law, it was now limited to the period specified in the statutes passed for his protection, during which specific remedies are afforded to him;” and, although I entirely assent to the reasoning that no right to print and publish a book is acquired by purchasing a printed copy of it, any more than by a present from the author of a MS. copy before publication, I admit that this is a fit subject for legislative enactment. Perhaps there could not be a better arrangement for authors, and for the public, than by the recent statute, which gives an efficient monopoly during the author’s life and a reasonable time afterwards for the benefit of his family, and secures the free circulation of the work in all time thereafter.

In looking through the reports of Lord Mansfield’s decisions, it is

wonderful to observe how many of them turn upon the law of evidence ; but we must remember that “ he found it of brick, and that he left it of marble.” It was indispensably necessary for him in this department to overrule many *dicta* to be found in the old Reporters ; and, early in his career, he said, “ We do not sit here to take our rules of evidence from *Siderfin* and *Keble*.” The whole of it was “ judge-made law,” and much of it made by judges of very narrow understandings, who held, among other things, that “ Jews, Turks, and infidels are not to be examined as witnesses because they cannot kiss the Holy Gospels.” Considering that, before juries, the verdict depended upon the impression made upon the minds of unlearned men, he was bound to exclude all evidence which was more likely to mislead than to assist them ; but still he leaned against the old maxims by which evidence was rejected instead of being sifted, and he wished that objections should be pointed against the credit rather than against the competency of witnesses. He, on one occasion, fell into a considerable blunder, by admitting witnesses to contradict a written agreement signed by the parties ;<sup>1</sup> but the great bulk of his decisions respecting the admission or rejection of evidence have been received with approbation, and to them chiefly we are indebted for our established rules upon this important subject. These place the English law for once above the Roman Civil Law itself, which, notwithstanding its general exquisite good sense, is here arbitrary and capricious. Lord Mansfield obtained the highest renown in this department by his committing for perjury the attesting witnesses to a will who falsely swore that they never saw it executed by the testator, and permitting the will to be established by the testimony of other witnesses who were acquainted with the testator’s handwriting.<sup>2</sup>

I must now mention the case of *Perrin v. Blake*, which divided the profession of the law into bitter factions for many years, and which is still famous in the traditions of Westminster Hall. I am sorry to say that in the course of the discussions which arose upon it Lord Mansfield got into a very awkward scrape, from which he was not able to extricate himself with credit ; and that it afforded his enemies plausible grounds for charging him with rashness, obstinacy, and disingenuousness. The following statement, which necessarily enters into some of the subtleties of English conveyancing, had better be passed over by *non-learned* readers ; but without it this memoir would sadly disappoint many of my legal brethren, who, when they first see “ THE LIVES OF THE CHIEF JUSTICES,” will eagerly turn to discover which side the author takes in the great “ *Perrin-oblakeian* controversy.” A testator, seised in fee of lands, duly made his will in the following form ;—

“ It is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his life ; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John, and any son my wife may be *enciente* of at my death, for and during the term of their natural lives ; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said son John and the said infant ; the remainder to the heirs of the bodies

<sup>1</sup> *Meres v. Ansell*, 3 Wils. 275.

<sup>2</sup> See 2 Evans, 300—359.



of my said son John and the said infant, lawfully begotten, or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale, during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them; and I do declare it to be my will and pleasure, that the share or part of any of my said daughters that shall happen to die shall immediately vest in the heirs of her body in manner aforesaid."

The wife was not *enciente*; and John, the son, insisting that under the will he was tenant in tail, suffered a recovery, and alienated. On his death the person next in remainder, contending that John was only tenant for life, brought an action to recover the lands; and the great question was, whether he took an estate for life or in tail? According to the celebrated rule in *Shelley's Case*, established in the reign of Elizabeth on feudal principles and on prior authorities, "where an estate of freehold is given to an ancestor, and in the same gift or conveyance an estate is given either mediately or immediately to his heirs, these are construed words of limitation, not of purchase, and he himself takes an estate tail."<sup>1</sup> Now by this will there was an estate for life limited to John, with a remainder to the heirs of his body. Therefore, if the rule was to be applied, John was tenant in tail, with the power of alienation. But the testator had declared his intention to be that none of his children should sell or dispose of the estate, and he had interposed a limitation to Isaac Gale during John's life. It was contended, therefore, that he had manifested a clear intention that John should take for life only, and that the heirs of John should take by *purchase* (in the language of the law,) and not by *descent*; *i. e.* immediately from the testator, and not as inheriting from the first taker. There had been a solemn decision in *Coulson v. Coulson*, before Lord Mansfield, that such words, intimating an intention by the testator that the first taker should not have a power of alienation, did not overcome the effect of giving by the same instrument an estate for life to a devisee, with a remainder to the heirs of his body, upon the supposition that the testator must be supposed to have used the words of these limitations in their usual technical sense, and that their effect was not to be controlled by other words indicating a wish or intention inconsistent with or derogatory to the estate-tail so created. The universal opinion of lawyers now is, that *Perrin v. Blake* should at once have been determined in conformity to this rule, which had long been acquiesced in and acted upon. But, unfortunately, Lord Mansfield being intoxicated by the incense offered up to him, or misled by an excessive desire of preferring what he considered principle to authority, took a different view of the construction of the will, and resolved that John should only be considered as having taken an estate for life. Two of the puisnies (Willes and Aston) were induced to agree with him, but the stout-hearted Yates stubbornly stood out for the rule in *Shelley's Case* and the authority of *Coulson v. Coulson*.

<sup>1</sup> *Shelley's Case*, 1 Rep. 93a.



*Lord Mansfield*: "The law having allowed a free communication of intention to the testator, it would be strange to say to him, 'Now you have communicated your intention, so that every body understands what you mean; yet because you have used a certain expression of art, we will cross your intention and give your will a different construction, though what you meant to have done is perfectly legal, and the only reason for contravening you is because you have not expressed yourself as a lawyer.' My examination of this question always has, and, I believe, ever will, convince me that the legal intention, when clearly explained, is to control the legal sense of a term of art, unwarily used by the testator. It is true, in *Shelley's Case* the rule is laid down as stated to-day; but that rule can never affect this question. I must agree with my brothers Aston and Willes, on the grounds that the intention must govern; that here the intention is manifest that *Shelley's Case* is no universal proposition, and that there is no sound distinction between a devise of the legal estate and of a trust, or between an executory trust and one executed."

[After commenting on the cases, he thus concluded:] "I admit that there is a devise to John the testator's son for life, and in the same will a devise to the heirs of his body; and I agree that this is within the rule of *Shelley's Case*, and I do not doubt that there are and have been always lawyers of a different bent of genius and different course of education, who have chosen to adhere to the strict letter of the law, and they will say that *Shelley's Case* is an uncontrollable authority, and they will make a difference between trusts and legal estates, to the harassing of a suitor; but if the courts of law will adhere to the mere letter of the law, the great men who preside in Chancery will ever discover new ways to creep out of the lines of law, and will tamper with equity. My opinion, therefore, is, that the intention being clear beyond doubt to give an estate for life only to John, and an inheritance successively to be taken by the heirs of his body, and his intention being consistent with the rules of law, it shall be complied with in contradiction to the legal sense of the words used by the testator so unguardedly and ignorantly."

This judgment was brought by writ of error into the Exchequer Chamber, and there was reversed by the opinions of all the Judges of the Common Pleas and Exchequer except Chief Justice De Grey and Baron Smyth.<sup>3</sup> Many, however, thinking that Lord Mansfield must be

<sup>1</sup> These words are put into Lord M.'s mouth, but I cannot believe that he spoke them, as in executory trusts the same effect is not given to technical language.

<sup>2</sup> Judge Yates was so much hurt by the sarcasms thus levelled against him, that he resigned his seat in the Court of King's Bench, and transferred himself to the Court of Common Pleas.

<sup>3</sup> Mr. Justice Blackstone's argument on this occasion was so inimitably exquisite, that his reputation as a lawyer depends upon it still more than upon his COMMENTARIES, and I cannot deny myself the pleasure of copying a few sentences from it:—"It is the best and safest way to adhere to those criteria which the wisdom of the law has established for the certainty and the quiet of property. Every testator when he uses the legal idiom shall be supposed to use it in its legal meaning. If the contrary doctrine were to prevail,—if courts, either of law or equity (in both of which the rules of interpretation must always

infallible, still backed his opinion, and the case was brought by another writ of error to the court of *dernier resort*, where he had a voice, and where his influence was unbounded. Such apprehensions were entertained, that the contending parties agreed to an equal division of the property.

But this compromise by no means put an end to the controversy between the *Shelleyites* and *Anti-Shelleyites*, which continued to rage with increased violence for years. Many pamphlets were written for and against the rule, and for and against the application of it to *Perrin v. Blake*. Sir James Burrow, the Master of the Crown Office in the Court of King's Bench, and the Reporter of Lord Mansfield's decisions, tried to protect his patron from the attacks aimed at him, and wrote a warm panegyric upon him, describing the felicity of the times under such a Chief Justice, and expressing wonder at the multiplicity of the business now brought before the Court, and the ability and celerity with which it was dispatched; to the universal satisfaction of mankind. This unfortunately excited the indignation of Mr. Fearne, the celebrated conveyancer, a man of as acute understanding as Pascal or Sir Isaac Newton. He had been as much shocked by the disrespect shown to the rule in *Shelley's Case* as if it had been a fundamental article of our holy religion, and he could not endure the praise bestowed upon the author of this deadly heresy. Therefore, in a new edition of his famous "Essay on Contingent Remainders," he introduced many sarcastic observations on this encomiast, which he thus concluded:—"In forming an estimate of the times, we must look to the attributes of those men whose characters and conduct impart the tinge and impress the stamp. An inquiry of this kind necessarily opens with the question, *Vir bonis est quis?* To which we find the answer, *Qui consulta patrum qui leges juraque servat.*" He further in a very offensive manner, asserted that Lord Mansfield, when Solicitor General, had himself deliberately given an opinion upon this very will, in conformity to law, "that John the son took an estate tail;" and he published the following as a copy of this opinion:—

"Upon the authority of the late determination in *Coulson and Coulson*, though I am aware how far the expression here differs from that

be the same), if these, or either of them, should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to their grammatical or legal construction, the consequence must be endless litigation. Every title that belongs to a will must be brought into Westminster Hall; for if once we depart from the established rule of interpretation without a moral certainty that the meaning of the testator requires it, no interpretation can be safe till it has had the sanction of a court of justice. The law of real property in this country is now formed into a fine artificial system, full of unseen connexions and nice dependencies, and he that breaks one link of the chain endangers the dissolution of the whole. Will it be said that when the testator's intent is manifest, the law will supply the proper means to carry it into execution, though he may have used improper ones? This would be turning every devise into an executory trust, and would be arming every court of law with more than the jurisdiction of a court of equity; a power to frame a conveyance for the testator, instead of construing that which he has already framed."

case, I think the remainder to the heirs of the body of John will operate as a limitation to him in tail, which by a recovery properly suffered, he might dock.

“W. MURRAY.”

“April 10, 1747.”

This attack would soon have been forgotten if Lord Mansfield and his friends had taken no notice of it, or had only said that he had forgotten that he ever gave such an opinion, or that upon considering the matter he had seen reason to alter it; but Mr. Justice Buller soon after took occasion publicly to say, that “he had the strongest reason to believe that no such opinion was ever given by the then Solicitor General, to whom it was ascribed,”—and Lord Mansfield, sitting by his side, himself observed—

“Since it has been mentioned, I must take notice that it is most certainly true that I never gave any such opinion as that in print, nor any opinion at all on that will in the year 1747. Several opinions had been taken at different times, as events arose, and copies of them were furnished to the Court, on the argument of *Perrin v. Blake*. There were three given by Sir Dudley Ryder, and three by myself. Of those given by myself, the first was before 1746, the second in that year, and the third in 1748. I have the copies still by me; and the third states that I had perused my two former opinions, dated so and so, and concurred therewith; viz. ‘that John only took an estate for life;’ which makes it impossible that I should have given a contrary opinion. The learned author has been too hasty in his publication, and must have been imposed upon.”

This disavowal immediately produced a peppery pamphlet, in the shape of a letter from Mr. Fearn to Lord Mansfield, setting out a copy of the case for the opinion of Mr. Murray, to which the opinion of 10th April, 1747, was an answer, stating that he had received them from Mr. Booth, lately deceased, who, declaring that he had seen the original, had entered them in his collections, with other opinions to the same effect, for the instruction of his pupils, and that he had dedicated to the same Mr. Booth the edition of his “Contingent Remainders” in which the disavowed opinion was first printed. He ironically added,—

“I think it greatly to be regretted, my Lord, that my much respected friend, Mr. Booth, whom I have often heard commemorate the honor he experienced in your Lordship’s intimacy and friendship during a course of several years antecedent and subsequent to the period which is said to have produced the opinion published by me, did not live to see his mistake corrected, a mistake that seems to have stood so many years recorded in those books which were the constant resort of that gentleman’s professional practice. A mistake I am confident it must have been, for Mr. Booth (I appeal to your Lordship’s own knowledge of that gentleman) never would have let me commit such a copy of your opinion to the press, and have admitted the dedication to himself of the book containing it, if he had thought its genuineness or accuracy in any degree questionable. Abstracted from the credit due to Mr. Booth’s verbal assurance, I could not, my Lord, conceive an idea of that gentle-

man's recording a collection of spurious opinions, under imaginary names, as *authorities*. It was not for me to suspect the genuineness of copies thus authenticated; and, though the event has disappointed the most conclusive appearances, yet I trust, my Lord, no man is or can be culpable for not reckoning on a *possibility* that betrays all grounds of belief, and starts into *fact* under the veil of incredulity. Such an event may serve, indeed, as a caution to the world against too *implicit* a credit, even to the most AUTHORITATIVE of human asseverations."

The Conveyancer was generally allowed to have gained a complete triumph over the Chief Justice, and many expressed their belief that the opinions which Lord Mansfield declared he had given were all imaginary: but it was afterwards clearly proved that he had at least given one in accordance with his judgment, for the original was produced, and the following is a copy of it:—

"I think John Williams under the will of his father was entitled only to an estate for life, either in the real or personal estate. Whether he took a remainder in tail in the real estate after a limitation to Gale, or whether the heirs of his body were to take as purchasers, may admit of great doubt; but I incline to think the heirs of his body ought to be construed words of purchase; and I ground my opinion upon the declaration with which the whole devise is introduced, which seems as strong as the words *for life only* in the case of Backhouse and Wells.

"31 Jan. 1746.

W. MURRAY."

The undoubted fact seems to be that, in the hurry of business, he had signed and forgotten both opinions,—which were, perhaps, written by *devils* or deputies. His reputation was considerably tarnished by his judgment in *Perrin v. Blake*, and still more so by the personal dispute which arose out of it.<sup>1</sup>

But there is no sufficient ground for the general charges brought against him by malevolent or by narrow-minded persons—that in deciding civil rights he systematically disregarded the rules of the Common Law, and gave a preference to the Roman Law, to his own caprice, or to the doctrines of Equity. It may be proper here to give a specific refutation of these charges:—

"In contempt or ignorance of the common law of England," says JUNIUS, "you have made it your study to introduce into the court where you preside measures of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinion of foreign civilians, are your perpetual theme; but who ever heard you mention MAGNA CHARTA or the BILL OF RIGHTS with approbation or respect? By such treacherous arts the noble simplicity and free spirit of our Saxon laws were first corrupted. The Norman conquest was not complete until

<sup>1</sup> I tremble when I think how stupid my account of the affair may appear; but the *lay gents* should know, that it was not only intensely interesting when it arose, but that now, when conversation flags among us lawyers, one of us, to cause certain excitement and loquacity, will say,—“Do you think that *Perrin v. Blake* was well decided in the Court of King's Bench?” or, “Do you believe that Lord Mansfield really gave the opinion, in 1747, which *Fearne* imputes to him?”



Norman lawyers had introduced their laws and reduced slavery to a system. Instead of those certain positive rules by which the judgments of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. Decisions given upon such principles do not alarm the public so much as they ought, because the consequence and tendency of each particular instance is not observed or regarded. In the mean time the practice gains ground; the Court of King's Bench becomes a court of equity; and the judge, instead of consulting the law of the land, refers only to the wisdom of the court and the purity of his own conscience."

I am sorry to think of the countenance given to these misrepresentations by grave judicial authorities. Lord Eldon, Lord Kenyon, and Lord Redesdale, were accustomed to "shake their heads at Murray," because he ventured to view questions of law scientifically, and, where he was not restricted by precedents, to deal out justice in a manner, that would not have suggested itself to a mere formalist. Many passages might be selected from their judgments seeking to disparage him; but I shall content myself with the concentrated abuse of him by Lord Redesdale, when Chancellor of Ireland, in the case of *French v. Woolston*.<sup>1</sup>

"Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known; and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. Lord Mansfield seems to have considered that it manifested liberality of sentiment to endeavor to give the courts of law the powers which are vested in equity; that it was the duty of a good judge *ampliare jurisdictionem*."

For the first charge, by JUNIUS, there is not the slightest color or pretence. Lord Mansfield did not think (and no man qualified to form an opinion upon the subject can think) that the Common Law of England, as we find it in the old Text-books and Reports, was a perfect code adapted to the wants of a civilized and commercial nation. He did consider (as all qualified to form an opinion upon the subject must consider) the Roman Civil Law a splendid monument of human wisdom. But in no instance did he ever attempt to substitute the rules and maxims of the latter for those of the former where they are at variance. He made ample use of the compilation of Justinian, and of the commentators upon it, but only for a supply of principles to guide him upon questions unsettled by prior decisions in England. He derived similar assistance from the law of nations, and from the modern continental codes. But while he grafted new shoots of great value on the barren branches of the Saxon juridical tree, he never injured its roots, and he allowed this vigorous stock to bear the native and racy fruits for which it had been justly renowned.

There is more plausibility in the charge that he neglected former

<sup>1</sup> 1 Scholes and Lefroy, 152.

decisions too much for his own notions of justice and expediency,—forgetting that he sat on the bench *jus dicere, non jus dare*—to administer the existing law, not to legislate. He certainly was on several occasions led astray by a desire to make the rules laid down by his predecessors bend to the necessities of an altered state of the social system. For example, he held that an action might be maintained against a married woman, as if she were single, where she had property settled upon her separately and her husband was not liable for the debt;<sup>1</sup> and this heresy was afterwards condemned by more orthodox judges, who thought that human reason was not to be exercised in such a matter of faith.<sup>2</sup> But he rarely showed any exception to his systematic respect for established forms, and his leading object was, by their assistance, to get at justice. Thus, in the *King v. the Mayor of Carmarthen*, he gave full effect to a mere technical objection, but contrived a mode by which the merits of the case might nevertheless be inquired into, saying, “General rules are widely established for attaining justice with ease, certainty, and despatch. But the great end of them being to do justice, the Court are to see that it be really attained. What I have suggested seems to be the true way to come at justice, and what we ought therefore to do; for the genuine test is ‘boni judicis ampliare *justitiam*’ not *jurisdictionem*, as it has been often cited.”<sup>3</sup> And here is the limit which he wisely laid down to the argument *ab inconvenienti*: “Arguments of convenience and inconvenience are always to be taken into consideration when we are not tied down by erroneous opinions, which have prevailed so far in practice that property would be shaken by any alteration of them.”<sup>4</sup>

But the charge which has stuck to Lord Mansfield, and, being often reiterated, has to a certain degree damaged his authority in Westminster Hall, is, that, sitting in the Court of King’s Bench, he neglected the boundary between legal and equitable jurisdiction. This is treated with levity by the uninitiated. “As a judge,” says Lord Mahon, “several lawyers have objected to him that ‘he introduced too much *equity* into his court,’—a reproach which, till they explain it, sounds like a satire on their own profession.”<sup>5</sup> It is easy to explain how this would be a reproach if well founded. By the fundamental constitution of our juridical system, whether for good or for evil, there are two sorts of courts—courts of law and courts of equity—in which, on the same facts, a different decision is given respecting rights and liabilities,—with a view of obtaining ultimately a satisfactory distribution of justice. In the nature of things there is a distinction between the matters referred to the one set of courts and to the other;—courts of law, for example, having cognizance where there are only two parties in whom is exclusively vested both the beneficial and the legal interest,—whereas courts of equity only can

<sup>1</sup> See *Ringsted v. Lady Lanesborough*, 3 Doug. 197; *Carbott v. Poelnitz*, 1 Term Rep. 5.

<sup>2</sup> *Marshall v. Rutton*, 8 Term Rep. 545.

<sup>3</sup> 1 Burr. 292.

<sup>4</sup> *Burgess v. Wheat*, Sir W. Blackstone’s Rep. 123, in the decision of which he assisted Lord Chancellor Northington.

<sup>5</sup> History, iv. 53.

give adequate relief when there is a multiplicity of parties, and those in whom the legal right is vested are only trustees for others who ought to enjoy beneficially. The procedure by which suits between these different parties are conducted is by necessity essentially different, and to confound the rules by which they are to be conducted must produce confusion and mischief. Neither must Law be irregularly imported into a court of equity, nor Equity into a court of law. Had Lord Mansfield really attempted to make the Court of King's Bench a court of equity, drawing to its cognizance disputes which could not be properly adjusted by the machinery belonging to it, and attempting to enforce the performance of fiduciary obligations, I should have thought that he deserved all the censure which has been heaped upon him. But it will be found that he never sought, in one single instance, to exercise in a court of law jurisdiction which is not assigned by the constitution to a court of law, and for which a court of law is not fully competent. Equity practitioners, the mere creatures of habit, who think that our juridical proceedings, as they first beheld them, rest upon the eternal fitness of things, and are as unchangeable in their nature as the movements of the heavenly bodies, were shocked by seeing him save time and expense in the conduct of an action on a policy of insurance, by requiring a disclosure of papers essential to the trial, and by granting a commission to examine witnesses abroad—thereby obviating the necessity for filing a bill in the Court of Chancery to effectuate the very same object.

But then he is accused of saying that "whatever is a good execution of a power in equity should be considered good in law." This charge is untrue. There are certain cases in which the validity of the execution of a power, when the required form has not been strictly observed, depends upon circumstances which a court of equity alone has the means of investigating, as where the power is executed for a valuable consideration; and these he was always for leaving exclusively to a court of equity, considering the execution invalid at law. There is another class of cases where, although the required form has not been observed, the execution is held void at law, and uniformly valid in equity, without looking beyond the power and the deed executing it. As where tenant for life being authorized, under a marriage settlement, to limit the premises to his wife for her life by way of jointure, he grants a term for ninety-nine years, determinable on her life, Lord Hardwicke, in the Court of King's Bench, held that the term was void, not being warranted by the words of the power; and Lord Talbot, in the Court of Chancery, without any other circumstance, held the term to be valid, and decreed the defendant to pay all the costs both at law and in equity. In such cases Lord Mansfield thought, very reasonably, that an invariable rule being laid down, the execution of the power should be supported at law as well as in equity.<sup>1</sup>

The remaining alleged instance of his confounding law and equity, is a doctrine falsely imputed to him, that in an action of ejectment the equitable estate shall prevail. This would, indeed, have been most mis-

<sup>1</sup> Str. 992; Burr. 1147; 7 Term Rep. 480.

chievous, for nothing has tended more to the security of title in England than keeping distinct the legal and equitable estate in land; and the result of an action of ejectment must not depend upon *trusts*, which a jury would be unfit to decide or to comprehend. Lord Mansfield never thought for a moment that in ejectment there could be a recovery on an equitable title. He did declare "that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be non-suited by a term outstanding in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee; but that they would direct the jury to presume it surrendered." The true meaning of this resolution is that, where trustees ought to convey to the beneficial owner, it shall be left to the jury to presume that they have conveyed accordingly; and where the beneficial occupation of an estate induces the probability that there has been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be directed to presume a conveyance of the legal estate. Lord Mansfield justly complained of the absurdity of English conveyancing by which the creation of terms is used for the purpose of charging the land, and these terms are still supposed to continue when the purpose is served for which they were created; but he never for a moment countenanced the doctrine that in a court of law the legal title must not prevail.<sup>1</sup> Such are the "equitable doctrines of Lord Mansfield" which offended the pedants of Westminster Hall. He never even showed any predilection for the peculiar modes of protecting in equity, and he used manfully to insist upon the maxim that "equity follows the law,"—as when he declared that equity had no right to support a lease granted by a mortgagor after the mortgage, or to treat commercial questions differently, or to put a different construction on an act of parliament.<sup>2</sup> Whatever JUNIUS might assert, it is well known that Lord Mansfield, instead of preferring prætorian process, by which law and fact were to be decided by a single judge, sincerely praised the Common law in so far as it separates law from fact, referring law to four judges, and fact to twelve jurymen; and that he himself often declared that he never passed his time more satisfactorily or agreeably than in trying mercantile causes by a special jury of merchants at Guildhall.<sup>3</sup>

While libelled by JUNIUS and his followers, Lord Mansfield was justly complimented by BURKE, a philosophic statesman deeply imbued with the scientific principles of jurisprudence, who, having been constantly opposed to him in politics, could have viewed his judicial career with no favorable prepossessions, but having quoted his arguments at the bar to show that a Hindoo should be admitted as a witness, when sworn according to the ceremonies of the Hindoo religion, thus proceeds:—

"The sentiments of Murray, the Solicitor General, are of no small

<sup>1</sup> See *Lade v. Halford*, Bull. N. P., 110; *Weakly v. Bucknell*, Cowp. 483; *Yeo v. Rogers*, 6 East, 138, n.

<sup>2</sup> See 2 Evans, 404.

<sup>3</sup> He had great influence with juries, and hardly ever "lost the verdict;" *i. e.* the jury almost invariably found the verdict according to his direction.



weight in themselves, and they are authority by being judicially adopted. His ideas go to the growing amelioration of the law by making its liberality keep pace with the demands of justice and the actual concerns of the world,—not restricting the infinitely diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire. This enlargement of our concerns he appears, in the year 1744,<sup>1</sup> almost to have foreseen; and he lived to behold it.”

To complete my general sketch of Lord Mansfield on the bench, I ought here to notice him as a Criminal Judge—although I shall afterwards have to give some details of state trials at which he presided. Sitting in the Crown Court he was, if possible, more remarkable for calmness, courtesy and dignity. There was no complaint of any improper convictions before him, but he did not allow the guilty much chance of escaping, and, for the sake of example, he was somewhat severe in the punishments he inflicted. In case of forgery he was always for carrying the capital sentence into execution. Attending the Council when the *Perreaus* had been found guilty, he strongly concurred in rejecting the powerful intercession for mercy; and the fate of Dr. Dodd was afterwards ascribed to the pointed answer which he gave when the King asked whether, on account of the convict being a clergyman, his life might not be spared,—“If Dr. Dodd does not suffer the sentence of the law, the *Perreaus* have been murdered.”<sup>2</sup> This feeling proceeded by no means from any cruelty in his nature, but from the opinion then and long after very generally entertained by reflecting men, as well as by the multitude, that it was indispensably necessary, for our commercial credit, to visit forgery with death in every instance.<sup>3</sup> That he was not in advance of the age in which he lived, justifies regret but not censure.

Before resuming my narrative, I have only to mention that for thirty years Lord Mansfield took the principal part in disposing of Scotch appeals in the House of Lords. For this task he was peculiarly well qualified by the familiar knowledge of Scotch law, in which a succession of Chancellors—Northington, Camden, and Bathurst—were utterly deficient. At the hearing of these cases he often sat as Speaker on the woolsack, and they were always disposed of according to his opinion. He was bold alike in his decision of feudal and of commercial cases; and he set the Scotch judges right in the construction of their own law, as well as of that which he was in the daily habit of administering. He was particularly obliged to restrain their devoted love of *perpetuities*, which English lawyers are trained to hate; and in the great *Duntreath*

<sup>1</sup> The year in which *Omichund v. Barker* was argued and determined, 1 Atkyns, p. 40–42.

<sup>2</sup> Holl. 148–149.

<sup>3</sup> I myself once heard a judge, at Stafford, thus conclude an address to a prisoner convicted of uttering a forged one-pound note, after having pointed out to him the enormity of the offence, and exhorted him to prepare for another world:—“And I trust that through the merits and mediation of our Blessed Redeemer, you may there experience that mercy which a due regard to the credit of the paper currency of the country forbids you to hope for here.”

*Case* he reversed the unanimous judgment of the fifteen Lords of Session in favor of a defective entail, and thereby struck off the fetters of half the entailed estates in Scotland. At first there was deep grumbling against this decision in the Parliament House at Edinburgh; but it was afterwards allowed, even there, to have proceeded on sound feudal principles.

Although, generally speaking, no lay lord interfered in the consideration of any Scotch appeals, the Douglas cause agitated all the members of the House, and was a subject of intrigue and canvass as much as a motion for an address of want of confidence to turn out a minister. Lord Mansfield, I think, took the right side in holding the claimant to be the true son of Lady Jane Douglas, not of the Paris rope-dancer; but his speech, as reported, is very inferior to his usual juridical efforts. This may be accounted for from the audience he addressed, who were more likely to be influenced by an appeal to their feelings and their prejudices than by a sound exposition of the principles of law involved in the case, and a masterly analysis of the evidence.<sup>1</sup>

From this sketch, however imperfect, of Lord Mansfield as a Judge, I think it must be admitted that he is one of the greatest who has ever appeared; and that, while he impartially dealt out justice to the litigants who appeared before him,—by the enlightened principles which he laid down and the wise rules which he established he materially improved the jurisprudence of his country. This is surely fame little inferior to that of winning battles or making discoveries in science.<sup>2</sup>

I must now follow his political career, which was more checkered, and on which opinions are much more divided.

## CHAPTER XXXV.

CONTINUATION OF THE LIFE OF LORD MANSFIELD FROM HIS BEING MADE CHIEF JUSTICE TILL THE ACCESSION OF GEORGE III.

LORD MANSFIELD had hardly been inaugurated as Chief Justice of the King's Bench when he was offered the higher dignity [Nov. 1756.] of Lord Chancellor. Lord Hardwicke, notwithstanding the efforts made to retain him, had insisted on reigning along with the Duke of Newcastle; and the new Ministers were much at a loss for a successor to him, there being no lawyer connected with them whom they

<sup>1</sup> The chief argument he relied upon was, that Lady Jane Douglas, being of such illustrious descent, could not possibly have committed the fraud imputed to her. See *Lives of the Chancellors*, v. 234.

<sup>2</sup> I again apologise for introducing so many law cases into a memoir intended for general circulation; but it should be recollected that the selection is made from many volumes of Reports, extending over a period of above thirty years.

could put forward in such a conspicuous position. It seems strange to us that they should have thought of the Attorney General of the Government they had overturned; but we must remember that, in the reign of George II., all political men who were candidates for office were *Whigs* alike, professing nearly the same political principles, and separated only by personal associations and enmities; so that, if considerations of private honor permitted, a politician took what course he chose, without incurring obloquy. The crime of *ratting* from one great party to another was then unknown. As the ties that had united Lord Mansfield with the Duke of Newcastle and Lord Hardwicke were understood to be dissolved, he might, without loss of character, have taken office with Pitt under the nominal headship of the Duke of Devonshire. But he at once rejected the proposal. He easily foresaw that the present Government, which had neither court favor nor parliamentary strength, nor popularity, must soon fall to pieces; and he was swayed by nobler considerations than the imprudence of exchanging an office which he held during life for one the tenure of which would be so precarious,—for all the glory to be acquired by perfecting our system of equitable jurisprudence had been already reaped, and he was just entering upon the untried undertaking of adapting the administration of justice in our common law courts to the new circumstances of the country. The great seal was therefore given in commission to Lord Chief Justice Willes, Mr. Justice Wilmot, and Mr. Baron Smith.<sup>1</sup>

On the meeting of Parliament Lord Mansfield took his seat in the House of Lords,<sup>2</sup> where he was destined fully to support the reputation he had acquired as an able debater. There is [DEC. 2.] only one volume of the Parliamentary History for twelve years, from 1753 to 1765, so that we have very few specimens of his oratory; but we know from contemporary memoirs that, not confining himself to legal questions, he was in the habit of speaking with powerful effect upon subjects connected with the general government of the empire. His maiden speech was drawn forth by a rather ludicrous incident, which we should consider harmless, and treat with a laugh. As a “quiz” upon the Min-

<sup>1</sup> Walp. Mem. Geo. II., 106–107.

<sup>2</sup> “Immediately after the King’s Speech at the commencement of the session, ‘the Speaker acquainted the House that there were some new created Lords without ready to be introduced.’ Whereupon William Murray, Esq., Lord Chief Justice of His Majesty’s Court of King’s Bench, being, by letters patent dated the 8th day of November, in the 30th year of the reign of His present Majesty, created Lord Mansfield, Baron of Mansfield, in the County of Nottingham, was (in his robes) introduced between the Lord Willoughby, of Parham, and the Lord Edgcombe (also in their robes), the Gentleman Usher of the Black Rod, Garter King at Arms and the Lord Great Chamberlain of England preceding.

“His Lordship, on his knee, presented his Patent to the Speaker at the wool-sack, who delivered it to the Clerk; and the same was read at the table.

“His Writ of Summons was also read, as follows:—‘George the Second,’ etc.

“Then his Lordship came to the table, and, having taken the oaths and made and subscribed the Declaration, and also taken and subscribed the Oath of Abjuration, pursuant to the statutes, was placed on the lower end of the Baron’s Bench.”—29 *Journal*, p. 5.

isters,—on the day when Parliament assembled there was printed and sold in the streets a spurious King's Speech, purporting to be "His Majesty's most gracious Speech to both Houses of Parliament." There being some talk of proceeding against the author, the King satirically observed, "I hope the man's punishment will be of the mildest sort, for I have read both speeches, and, as far as I understand them, the spurious speech is better than the one I delivered."<sup>1</sup> However, Lord Sandwich brought the matter before the House of Peers as a breach of privilege; [A. D. 1757.] and Lord Hardwicke, still taking the lead, having in a dictatorial way moved "that the delinquent parties should be imprisoned, and that the insolent document itself should be burnt in Palace Yard by the hands of the common hangman," Lord Mansfield agreed that such an insult to the Crown and the two Houses, if taken notice of, could not be passed over or dealt with more leniently than proposed by the noble and learned Lord, who had so long presided over their deliberations: although he might perhaps have done better by moving the previous question or an adjournment.<sup>2</sup>

Soon after, Lord Mansfield co-operated with Lord Hardwicke on a more worthy occasion, in rejecting the bill sent up from the Commons to authorise the officers who had sat on Admiral Byng's court martial to disclose the deliberations which had taken place among them before they found him *guilty* and sentenced him to be shot; but he was in no respect answerable for the atrocity of carrying into execution a sentence which was illegal on the face of it, as it acquitted the accused of cowardice and all bad motive, and was accompanied by an unanimous recommendation to mercy.<sup>3</sup>

Before many months had elapsed, the Ministry was dissolved; and, [APRIL 5.] on the dismissal of Mr. Legge, Lord Mansfield actually became Chancellor of the Exchequer. This was according to the ancient usage by which, on a vacancy of this office, the seals of it are delivered to the Chief Justice of the King's Bench for the time being, who does formal acts till a successor is appointed. Such a provisional arrangement had not previously lasted more than a few days; but Lord Mansfield continued nominally finance minister for three months, and speculations began to be formed how, being a peer, he was to open the Budget.

The whole of this interval was consumed by intrigues for the forma-

<sup>1</sup> There had been serious differences about the speech between the King and Pitt, who had written it.

<sup>2</sup> 15 Parl. Hist. 779; Walp. Mem. Geo. II., 109–110; Waldegrave's Mem. 89.

<sup>3</sup> 15 Parl. Hist. 803–822. Horace Walpole represents that, in opposing the bill, he indecorously entered into the merits of the case, trying to rouse indignation against the prisoner, and concluding with the observation,—“that there had been times when a sea-officer had blown up his ship rather than be taken or retreat”—*Mem. Geo. II.*, vol. ii. p. 174). But this is a palpable misrepresentation, proceeding from the writer's spite against the Duke of Newcastle, to whose influence he wishes to impute the execution of Byng. Lord Mansfield, at this time, was neither in, nor connected with the Government, and could be under no bias against the side of mercy.



tion of a new Ministry, in which he acted a very prominent part. To him it was chiefly owing that the reins of government were finally intrusted to Pitt, his former rival; and that the war, which had hitherto been marked by defeat and disgrace, ended in conquest and glory. After long huckstering, the King had resolved that the terms on which alone Pitt would accept office, should be rejected, and that Fox should be at the head of affairs as Chancellor of the Exchequer. Lord Mansfield was summoned to deliver up to him the seals of the office, and we have this statement from Lord Waldegrave of what then occurred:—

“On the morning of the 11th of June, Lord Chief Justice Mansfield was ordered to be at Kensington. The reason assigned was that he should deliver back the Exchequer seals, which had been in his possession from the time of Legge’s resignation; but the real business was of a different nature. The King discoursed with him a considerable time in the most confidential manner, and the conversation ended by giving Lord Mansfield full powers to negotiate with Pitt and the D. of Newcastle, his Majesty only insisting that Lord Temple should have no employment which required frequent attendance in the closet, and that Fox should be appointed Paymaster, which last demand did not proceed from any present partiality, but was the fulfilling of a former engagement. Before the final resolution was taken, his Majesty thought proper to take my advice. I told him I was clear in my opinion that our administration would be routed at the opening of the session; for that the D. of Newcastle had a considerable majority in the House of Commons, whilst the popular cry without doors was violent in favor of Mr. Pitt.”

Lord Mansfield, on his return, wrote the following account of his interview to Lord Hardwicke, with whom he was now co-operating very cordially:—

“Saturday, 4 o’clock.

“My Lord,—I am just come from Kensington, where I was by order to deliver the seal, & Mr. Fox was there to receive it. Upon my going into the closet, the King did me the honor to talk to me of the present melancholy situation, & bid me tell him what I thought. I did so very sincerely, & made a great impression. The result was, that I have brought the seal back, and am to speak to the D. of N. & y<sup>r</sup> L<sup>p</sup>. By good luck I met the D. of N. at Hyde Park corner. I stopped L<sup>d</sup> Rockingham’s resignation, which I never approved of; he followed me home, & now tells me that he stopped the D. of Rutland. I am, at this moment, going to Guildhall, & give y<sup>r</sup> L<sup>p</sup> this trouble to know w<sup>r</sup> I may wait upon your Lordship if I get back before  $\frac{1}{2}$  an hour after 10.

“I beg your Lordship wou<sup>d</sup> not take the trouble to write, but to send me word how late I may venture to come if y<sup>r</sup> L<sup>p</sup> is to be at home to-night.

“I have the honor to be,

“With the greatest respect,

“Y<sup>r</sup> L<sup>p</sup>’s most obliged, hu. servant

“MANSFIELD.”

In consequence, the negotiation was renewed; and it was at last finally

arranged that Fox, with the Paymastership, by which he might amass wealth, would give no further trouble; that all jobbing patronage should be given to Newcastle; and that all real power should be intrusted to Pitt.

A serious difficulty arose with respect to the office of Chancellor, and it was again earnestly pressed on Lord Mansfield, whose reluctance it was hoped might be overcome by confidence in the stability of the new Government. But he had been much gratified by the applause which he had received as a Common Law Judge, and he resolved not to yield to another post for which he felt that he was so highly qualified. After a sordid chaffering with several eminent lawyers about peerages, pensions, and reversions, the great seal was given to Sir Robert Henly as Lord Keeper, who waived all conditions as to peerage, pension, or reversion;—the two distinguished law dignitaries who superintended the negotiation being well pleased that their empire in the Upper House was not to be invaded by any new competitor.

At last the new Administration was installed, and Lord Mansfield [JUNE 30.] surrendered back to Mr. Legge the seals of Chancellor of the Exchequer. But, instead of returning, as he ought to have done, to the exclusive discharge of his judicial duties, he unhappily assumed the character of a political judge by becoming a member of the Cabinet.

“Lord Mansfield,” says Horace Walpole, “was called to the *conciliabulum*, or essence of the council; an honor not only uncommon and due to his high abilities, but set off with his being proposed by Lord Hardwicke himself, who wished, he said, to get repose for three months in the country: Lord Mansfield would supply his place. It was about this time that this great Chief Justice set himself to take information against libels, and would sift, he said, what was the real liberty of the press. The occasions of the times had called him off from principles that favored an arbitrary king—he still leaned towards an arbitrary government.”<sup>1</sup>

All parties in the state being united, no opposition was made to an arrangement by which a Criminal Judge was to direct that prosecutions for treason and sedition, afterwards to come before him as a judge, should be instituted, and was to preside at trials where the question would be “whether a publication was libellous, or a just animadversion on the misdeeds of himself and his colleagues?” The administration of justice under such circumstances might be pure, but could not be free from suspicion; and the objection was obvious, that remarks upon the licentiousness of the press could not be made with proper freedom and effect by a judge who, although only performing his strict duty as an expounder of the law, might be denounced as a partisan trying to screen the imbecility or wickedness of the Government. It is a remarkable circumstance that the distinguished memoir-writer whom I have quoted, states, without any malice or satire, how Lord Mansfield henceforth began to yield to the arbitrary principles which he entertained, and

<sup>1</sup> Walp. Mem. Geo. II., vol. ii. pp. 265–266.

meditated the measures against the press by which he afterwards incurred so much obloquy. Although this arrangement was cited as a precedent when Lord Chief Justice Ellenborough was introduced into the Cabinet by a Whig Government in the year 1806, I must express a clear opinion that it was unconstitutional, and a strong hope that it will never be again attempted.<sup>1</sup>

In the division of the spoil upon this occasion the patronage of Scotland was assigned to Lord Mansfield.<sup>2</sup>

Debating now went out of fashion, and for a whole session together there would not be a single division in either House. It might have been thought that, to gain notoriety, or to [A. D. 1757-60.] please constituents, or to gratify malice, some adventurous members would occasionally have opposed the measures of Government however wise and successful, and brought forward motions however small the minority to divide in favor of them; but all persons, in and out of par-

<sup>1</sup> See Lives of the Chancellors, vol. vi. ch. clxxxv.

<sup>2</sup> The following is a letter from him, politely refusing the office of Lord President of the Court of Session to Lord Prestongrange, who, when Lord Advocate, had retired as a Puisne Judge:—

“London, 13th March, 1760.

“My dear Lord,—I had yesterday the favor of yours, and am much obliged to you for doing me the justice to believe that I am sincerely your friend and servt. I have seen no body of consequence as to the subject-matter of y<sup>r</sup> letter since I rec<sup>d</sup> it. Your pretensions are extremely well founded before you accepted a seat upon the bench; and since, I do assure you, report has been favorable to you here as you cou<sup>d</sup> desire. I think you can have no competitor except the Advocate; and I rather believe that he will have it, if he insists.

“I am with the greatest truth and regard,

“Y<sup>r</sup> most aff: hu: servt,

“MANSFIELD.”

Lord Mansfield when at the bar had written the same individual the following letter of congratulation on his becoming Lord Prestongrange:—

“Lincoln’s Inn, 8th Au: 1754.

“My dear Lord,—I am ashamed that I have not thanked you before for your very flattering and obliging letter. As it is agreeable to you to succeed Lord Elches, I wish you joy with all my heart. It is very happy for the people to have such offices so filled; tho’ I can’t help lamenting that we shall be deprived of the pleasure of y<sup>r</sup> company here, and the great benefit of y<sup>r</sup> assistance in the King’s service. I beg my compliments to Mrs. Grant; and hope you do me the justice to believe me,

“My dear Lord,

“Y<sup>r</sup> most aff: & ob: hu: servt,

“W. MURRAY.”

Lord Prestongrange afterwards applied for the office of Lord Justice Clerk, and received the following rebuff, showing the writer to be tired of his importunity:—

“Kenwood, 7th April, 1763.

“My dear Lord,—I am sorry for the J. Clerk, tho’ he has lived to so great an age. By y<sup>r</sup> letter, which I have this moment received, I suppose he is no more. I certainly shall not be consulted upon the choice of his successor. Common report has long said that it was fixed. If I had any power I would not fail to do justice to your pretensions, because I am and have been, with great truth.

“Your most aff: hu: servt

“MANSFIELD.”

liament, seem to have been intoxicated by the successes of the war,—bells rang, and bonfires blazed, and nothing was listened to except praises of the genius of Pitt in planning conquests and the heroic bravery of Wolfe in achieving them. In our parliamentary annals, from the accession of James I. to the present time, there is nothing to be found approaching the unanimity and tranquillity which marked the last years of the reign of George II.

In this interval Lord Mansfield, although always ready as a champion of the Ministers, had no occasion to defend them—and he spoke once, and once only, on a subject unconnected with party. A very useful bill had come up from the Commons, introduced by Mr. Pratt (afterwards Lord Camden), to improve the *Habeas Corpus* Act, by extending it to cases where parties were deprived of their liberty without any criminal charge being alleged against them. Blackstone's Commentaries, lately published, had taught the doctrine that the penal code of England, as it then existed, although we consider it to have been very defective as well as very bloody, was an absolute piece of perfection, and for more than half a century afterwards any one who proposed to amend it was denounced as disaffected or visionary. I am concerned to say that Lord Mansfield, from whom better things might have been expected, stirred up a furious opposition to this bill, and threw it out.<sup>1</sup> According to a report of his speech by Dr. Birch, he said "that people supported it from the groundless imagination that liberty was concerned in it, whereas it had as little to do with liberty as the Navigation Laws or the act for encouraging the cultivation of madder; that ignorance on subjects of this nature was extremely pardonable, since the knowledge of particular laws required a particular study of them; that the greatest genius, without such study, could no more become master of them than of Japanese literature without understanding the language of the country; and that the writ of *habeas corpus* at common law was a sufficient remedy against all those abuses which this bill was supposed to rectify."<sup>2</sup> However, in a more enlightened age the bill was again introduced and received unanimous support in both Houses of Parliament.<sup>3</sup>

Lord Mansfield was now called upon for the first time to preside at a state trial; and as the case was clear, and popular feeling [A. D. 1758.] ran with the prosecution, he passed through it without censure, although in reality he was both prosecutor and judge. Dr.

<sup>1</sup> June 4, 1758.

<sup>2</sup> 15 Parl. Hist. 900. Horace Walpole says,—“He spoke for two hours and a half. His voice and manner, composed of harmonious solemnity, were the least graces of his speech. I am not averse to own, that I never heard so much argument, so much sense, so much oratory, united. His deviation into the abstruse minutiae of the law served but as a foil to the luminous parts of the oration. Perhaps it was the only speech which in my time, had real effect,—that is convinced many persons; nor did I ever know how true a votary I was to liberty till I found I was not one of the number staggered by the speech.”—*Mem. Geo. II.*, ii. 301.

<sup>3</sup> 56 Geo. III. c. 100.



Hensey, a physician, had, since the commencement of the war, been in the pay of the French as a spy, receiving from them an allowance of 100*l.* a year. Our Government intercepted his letters, arrested him, seized his papers, and indicted him for high treason. His trial came on at the bar of the King's Bench before Lord Mansfield and the other judges of that court.

The evidence was entirely documentary, consisting of letters written to the prisoner from agents of the French Government, which were found in his bureau,—and letters written to him by these agents, which were intercepted in the General Post Office in London,—showing that he was in the habit of giving information to the enemy of the sailing of our fleets, and that in telling them of our projected expedition against Rochfort, he advised them to prevent it by invading England. His counsel strongly objected that the papers found in his bureau, not being written by him, and possibly being disapproved of by him, were no evidence against him; and that the letters in evidence which he had written did not amount to an overt act of treason any more than if they had remained in his bureau, as they were still in London when they came into the possession of the English Government:

“But Lord Mansfield said, that the papers found in the prisoner's bureau were clearly admissible evidence; it would be for the jury to say what weight was to be attached to them, and to consider how far the prisoner had repudiated them or acted upon them. So sending-off by the post a letter communicating intelligence to the enemy in time of war, he held to be a clear overt act of high treason, although it never reached its destination, the crime charged in the indictment being the compassing of the King's death, which, according to all the authorities, was proved by writing and sending off a letter conveying intelligence to the King's enemies, whether or not it reached its destination.”

The other judges concurring, the prisoner was found *guilty*, and the Chief Justice pronounced sentence of death upon him,—but he was afterwards pardoned, and there was reason to think that, as usual, he had acted as a spy on both sides.<sup>1</sup>

During the remainder of the reign of George II., Lord Mansfield did not appear before the public except in the ordinary discharge of his official duties. The House of Lords only met to adjourn—and when the King's grandson, the Prince of Wales, on coming of age, took his seat, and wished to try his powers of oratory in that assembly, it was found impossible to get up a debate for his maiden speech. Cabinets, when held, Lord Mansfield regularly attended, but they were very rare, and being chiefly for the consideration of domestic affairs, then of small importance, they attracted little notice.<sup>2</sup> Mr. Secretary Pitt, the Prime Minister, discussed in his own bosom all measures respecting foreign policy and the conduct of the war, and communicated his resolutions only to the functionaries

<sup>1</sup> 19 St. Tr. 1342—1382.; Harris's Life of Lord Hardwicke, iii. 170.; Walp. Mem. Geo. II., ii. 309.

<sup>2</sup> It is not very generally known, that both Lord Hardwicke and Lord Mansfield were cabinet ministers during Lord Chatham's first administration.

who were to carry them into execution.<sup>1</sup> Till the commencement of the new reign, Lord Mansfield's seat in the Cabinet was a mere honorary distinction. But from that era he acquired great political consequence, and for fifteen years to come there was probably no individual who more influenced the counsels of the nation both at home and abroad.

## CHAPTER XXXVI.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL THE DISAPPEARANCE OF JUNIUS.

HITHERTO Lord Mansfield had always called himself a Whig, although [OCT. 25, 1760.] entertaining and not disguising what are considered Tory principles; but now that on the accession of George III. there was to be a new distribution of parties, and that the Tory flag was openly hoisted by royalty, he rallied under it.

According to the construction put upon the Act of Settlement, which enacted that judges should hold their offices *during good behaviour* instead of *during pleasure*, he might have been removed on the demise of the Crown; but he was joyfully reinstated, and he soon became a special favorite of the new Sovereign. His party had been always opposed to Leicester House, and he had been looked upon with dislike by all its adherents, but no sooner did Lord Bute come forward with pretensions to be Prime Minister than there was a secret sympathy between them. They were countrymen, they equally cherished the doctrine of the divine right of kings, and they both hated Pitt. While Bute impatiently coveted the possession of Pitt's power, Murray enviously beheld the dazzling ascendancy attained by the man whom he had often beaten since their poetical struggle at Oxford.

Without any quarrel with the falling minister, or formal treaty with his successor, the sagacious Chief Justice showed a growing coldness towards the one, and cordiality towards the other,—not concealing his satisfaction when Lord Bute was made a Secretary of State in the room of Lord Holderness and was introduced into the Cabinet. At last the crisis arrived, and it was necessary to take a decided part either with the one or the other. Pitt was now obliged to bring forward great measures in a very different fashion from that adopted by him at the end of the last reign. Having certain intelligence of the family alliance between the several branches of the House of Bourbon, he had formed a magnificent scheme of at once declaring war against Spain, sweeping the ocean of her ships, and conquering the richest of her colonies. There seems every reason to believe, that if promptly executed it would certainly have

<sup>1</sup> Not always even to them, for he would make the Lords of the Admiralty sign papers which they were not allowed to read.

succeeded—but he was obliged to submit it to a cabinet. Mansfield took part with Bute, and the Great Commoner, being outvoted, [A. D. 1761.] declared that he “would not remain in a situation which made him responsible for measures he was no longer allowed to guide.” From that hour Lord Bute was considered Prime Minister, although it was some time before he could be placed at the head of the Treasury, from the adhesiveness of the Duke of Newcastle, who was willing to submit to any degradation rather than be driven to resign.

The new chief acted most cordially with Lord Mansfield, who had so essentially helped his elevation; and their proceedings were very prudent. Furious popular discontent was apprehended from the dismissal of the GREAT COMMONER, and even insurrections were talked of in the city of London and other great towns.

“Hi motus animorum, atque hæc certamina tanta,  
*Pulveris exigui juxta compressa quiescunt.*”

They advised the King to offer him a pension and a peerage for his wife. The offer was accepted, and the same Gazette announced his resignation and the honors and rewards heaped upon him. For a space he not only ceased to be formidable, but was denounced by his former admirers as sordid and corrupt.<sup>1</sup> “Oh that foolishness of men!” cried Gray. “What!” exclaimed Horace Walpole, “to blast one’s character for the sake of a paltry annuity and a long-necked peeress!” The tide ran so strong against the once GREAT COMMONER, that he was obliged to publish a letter addressed to his friend Alderman Beckford, in which he complains of being “grossly misrepresented” and “infamously traduced.”

While counselled by Mansfield, Lord Bute likewise behaved very prudently in opening the negotiation for peace, and in framing the preliminaries, which, though scouted by the ex-Premier, who was for still further humbling the House of Bourbon, were generally considered honorable and advantageous, and were approved of by a vast majority in both Houses of Parliament.

At this time it was believed by many, that Lord Mansfield, feeling the incompatibility of political power with his present office, desired to hold the great seal; hoping thus to be actual prime minister, while his countryman was at the head of the Treasury. The apprehension of such an arrangement caused deep uneasiness in the Hardwicke family, where a strong desire existed that Charles Yorke should be placed in the “marble chair,” to which his father had added such lustre. In a long letter written by him to the ex-Chancellor, giving an account of an interview on the subject<sup>2</sup> with Lord Littleton,

<sup>1</sup> “These,” said Burke, “were the barriers that were opposed against that torrent of popular rage which it was apprehended would proceed from this resignation. And the truth is, they answered their end perfectly: this torrent for some time was beaten back,—almost diverted into an opposite course.”—*Annual Register*, 1761, p. 45.

<sup>2</sup> This interview took place in consequence of a letter from Lord Hardwicke to Charles Yorke, containing the following information:—“Lord Lyttleton told me that, before he went last to Hagley, his friend Lord Egremont had said much to

—after pointing out the objections to a Scotchman being prime minister, and the proposal that he himself should have the great seal, he thus shows his jealousy and dislike of the Chief Justice of the King's Bench :—

“I added, with respect to the *thing* itself, that if I could suppose the King would ever do me the honor hinted, I should not be afraid to accept it, tho' I should think it too early, and in many respects not eligible at this time. I enquired how L<sup>d</sup> Mansfield stood, & whether he might not be thought of. He answered, that L<sup>d</sup> M. would feel nothing personally as to me, because he would see that it was impossible for him to have the great seal, *rebus sic stantibus*. His Lordship answered to a different point from what I meant. I meant to draw from him what he did not mention of the King's displeasure. For as to Lord M.'s feelings, they would be strong, but of no real consequence. His manner has been offensive & unpopular in Westminster Hall; & as S<sup>r</sup> Fr. Bacon says, *perhaps I may improve whilst others are at a stand*.”

Few, however, will believe that the wary Mansfield ever had such a fit of wild ambition, or could have been for a moment blind to the insuperable difficulties which his supposed scheme would have had to encounter.

For some reason that has never been explained, and which it would be vain now to conjecture, there was, soon after, a great coldness between the two Scotchmen, who, by a singular concatenation of improbable circumstances, had actually guided the destinies of England; and although the Chief Justice still continued a member of the Cabinet, the Prime Minister listened very little to his advice. Whether on this account I have no means of knowing, but certainly *henceforth*, he who had appeared a prudent statesman, likely long to enjoy power, was regarded as a minion of fortune, doomed to a speedy fall. He was at no pains decently to veil the unbounded power to which he had at once been raised by court favor, without ever before having been in office or made a speech in parliament; he insisted on all preferment passing through his own hands; and although aware of the jealousy excited by allusions to the place of his birth, he wantonly inflamed it by removing many deserving subordinates in the public offices from situations usually held for life, and conferring them on his needy countrymen. Instead of allowing the public to see the falsity, and to be disgusted with the ribaldry, of Wilkes's paper, the “NORTH BRITON,” set up against him, he seems to have resolved to verify its assertions while he wished to inflict upon the author

him on your subject; that Lord Chancellor (Northington) had complained to him of his health, and that he could not go on in his office; that he wished the King and his servants would be thinking of a proper successor, &c; that, on this occasion, his Majesty had mentioned you, and that you stood high in his opinion. Lord Lyttleton asked his Lordship how Lord Mansfield stood in that respect? to which Lord Egremont had answered, that the King was offended with him for so frequently declining to give his opinion in council, particularly at the last meeting at Lord President's, at which the Duke of Devonshire, Duke of Newcastle, and I was present. I understood that this was thrown out as a lure to me, being of so great consequence to my family.”—*Harris's Life of Lord Hardwicke*, iii. 302.



the heaviest penalties of the law. Finally, he threw the whole of England into a flame by rashly bringing forward the cider tax, and obstinately persisting in it. Still he was in the possession of royal favor and parliamentary majorities, although his colleagues ventured to remonstrate with him in private, and [A. D. 1762-1763.] Lord Mansfield even publicly threw out some hints intimating that there was not an entire coincidence of opinion between them. It was generally thought that he would long enjoy power.

But all of a sudden he voluntarily resigned. In a letter which he wrote at the time, he mainly imputed his fall to the same man who had contributed to his elevation. [APRIL, 1763.] "Single," he said, "in a cabinet of my own forming, no aid in the House of Lords to support me except two peers (Lords Denbigh and Pomfret), both the Secretaries of State silent, and the Lord Chief Justice, *whom I myself brought into office*,<sup>1</sup> voting for me, yet speaking against me, the ground I tread upon is so hollow, that I am afraid not only of falling myself, but of involving my royal master in my ruin. It is time for me to retire."<sup>2</sup>

Lord Mansfield continued a member of the Cabinet when George Grenville was placed at the head of the Treasury, but it seems hardly credible that he should have been present at its deliberations when the proceedings were ordered to be taken against the printers and publishers of the *North Briton*, No. 45 :—1. Those proceedings were so likely to come before him judicially, that he must have been struck with the impropriety of taking part in originating them. 2. The proceedings were so illegal and indiscreet, that, if present, he must have protested against them.

The parties aggrieved avoided the Court of King's Bench, and sought redress in the Court of Common Pleas from Lord Chief Justice Pratt, who was upon the eve of acquiring the greatest degree of popularity ever enjoyed by an English Judge. He liberated Wilkes from the Tower, on the ground of parliamentary privilege; and declaring [MAY 6.] general warrants to be illegal, he obtained from juries very heavy damages for those who had been arrested, and whose papers had been seized on the suspicion that they were [A. D. 1763-1765.] concerned in printing or publishing the No. of the *North Briton* which had been singled out for prosecution.<sup>3</sup>

The legality of general warrants, however, was brought before Lord Mansfield by the law officers of the Crown, who, in a case of *Leach v. Money*, tendered a bill of exceptions to Lord Camden's directions to the jury, that the general warrant against the printers and publishers of the

<sup>1</sup> I do not perfectly understand the meaning of this: but he must be referring to Lord Mansfield. Pratt was made Chief Justice soon after the accession of George III., but was not created a peer till July, 1765, by the Rockingham administration; so that he could neither have voted or spoken while Lord Bute was minister.

<sup>2</sup> Adolphus, i. 117.

<sup>3</sup> 2 Wilson, 151-160.; 19 St. Tr., 982-1002.; 2 Wilson, 206-244.

North Briton afforded no justification for the defendant, a king's messenger, in arresting the plaintiff under it.<sup>1</sup>

The question having been very elaborately argued by the Attorney [Nov. 1765.] General De Grey on the one side, and Dunning (who now first distinguished himself) on the other, Lord Mansfield, although there was to be a second argument, stated the impression then upon his mind in favor of the doctrine laid down by Chief Justice Pratt :—

“We are to consider,” said he, “the validity of a warrant in which no person is named or described. The common law, in many cases, gives authority to arrest without warrant, more especially when taken in the very act; and there are many cases in which particular statutes have given authority to apprehend under general warrants—as warrants to take up ‘loose, idle, and disorderly persons.’ But here it is not contended that there could be an arrest at common law without warrant, or that any statute gives a warrant in this general form. Therefore we must see whether, by the common law, such a warrant is valid? At present it seems to me unfit that the information as to a particular individual having committed the offences specified in the warrant should be received by the officer, and that he, in his discretion, should determine whether it is sufficient. The magistrate ought to decide and give certain directions to the officer; the one acting judicially, the other ministerially. So it stands on reason and convenience. Then as to authorities. Hale and all others hold such an uncertain warrant void, and there is no case or book to the contrary. It is said ‘the usage sanctions general warrants,’ and many such have been issued since the Revolution down to this time. But a usage to grow into law must be a general usage, *communiter usitata et approbata*; and which, after a long continuance, it would be mischievous to overturn. This is only the usage of a particular office—the Secretary of State’s—and contrary to the usage of all other justices and conservators of the peace. However, let it stand over for a further argument.”

When the case again came on, Charles Yorke, who in the mean time had been promoted to be Attorney General, wishing to avoid a judgment against the Crown on the merits, admitted that a formal objection which had been made to the defence must prevail, and nothing more was said about GENERAL WARRANTS; but ever since they have been considered illegal, and credit is due to Lord Mansfield for supporting principle against precedent in this case, considering that the warrant in question had been issued by his own colleague.<sup>2</sup>

<sup>1</sup> Sir James Burrow, with very amusing minuteness, describes the ceremony of Lord Chief Justice Pratt coming in person into the Court of King's Bench, and acknowledging his seal to the bill of exceptions; thus concluding:—“The Lord Chief Justice of the Common Pleas immediately retired, without sitting down; and the Lord Chief Justice of this Court attended him till he was got past the Puisne Judge, but not quite to the door of the Court.”—(3 Burr. 1694.) Nowhere is etiquette so strictly attended to as in Westminster Hall.

<sup>2</sup> 19 St. Tr. 10001—1028.; 3 Burr. 1692—1742.

He had a still nobler opportunity of raising his fame in reversing the outlawry of Wilkes. This profligate demagogue, after being liberated from the Tower, seeing no immediate means of exciting public sympathy, withdrew to Paris, and domiciled himself there. In the meantime, two criminal informations were filed against him by the law officers of the Crown; one for writing and publishing the famous No. 45, of the NORTH BRITON, and the other for writing and publishing an obscene and impious poem called an ESSAY ON WOMAN. [JAN. 1764.] Even before trial he was expelled the House of Commons for these alleged offences, and he was afterwards found *guilty* on both informations in his absence. Process of outlawry then issued [FEB.] against him, and, as he did not appear to receive sentence, he was actually outlawed.

But on the dissolution of Parliament, in the spring of the year 1768, the nation being frenzied by faction, he thought he might turn the extreme unpopularity of the Government to his own advantage, and, coming over from France while still an outlaw, he presented himself as a candidate to represent the city of London in the House of Commons. Although defeated there, he was returned by an immense majority for the county of Middlesex. Still it was necessary, before he could take his seat, that the outlawry [A. D. 1764–1768.] should be reversed, and for this purpose he appeared in person in the Court of King's Bench. After several irregular proceedings, which he attempted with a view of entrapping or overawing the judges, they committed him to prison till the validity of his outlawry could be decided in due form of law, and they very properly refused several applications which were made to bail him. The mob were highly exasperated by the captivity of their idol; attempts were made to rescue him; there were dangerous riots in the metropolis; some lives were lost; and dreadful denunciations and threatenings were poured forth against Lord Mansfield.

The hearing of Wilkes's case occupied several days; Westminster Hall, Palace Yard, and the surrounding streets being filled by an innumerable multitude of Wilkites, ready to celebrate his triumph or to revenge his defeat.<sup>1</sup> At last judgment [JUNE 8, 1768.] was to be pronounced.

Lord Mansfield began, and in a very luminous manner went over the various grounds on which it had been argued by the defendant's counsel that the outlawry should be reversed,—all turning on mere technical learning,—and he showed satisfactorily that none of them were well founded. It was thought that he had nothing more to observe, except that the outlawry must be affirmed, when he thus proceeded in a strain of calm and dignified eloquence for ever to be had in admiration:—

“These are the errors which have been objected; and, for the reasons I have given, I cannot allow any of them. It was our duty, as well as our inclination, sedulously to consider whether upon any other ground,

<sup>1</sup> No one in secret condemned their proceedings more than Wilkes himself; and he used afterwards to say that “he never was much of a Wilkite.”



or in any other light, we could find an informality which we might allow with satisfaction to our own minds, and avow to the world.

“But here let me pause!—It is fit to take some notice of the various terrors being held out; the numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom by commotions and general confusion.

“Give me leave to take the opportunity of this great and respectable audience, to let the whole world know that all such attempts are vain. Unless we have been able to find an error which will bear us out to reverse the outlawry, it must be affirmed. The constitution does not allow reasons of state to influence our judgments. God forbid it should! We must not regard political consequences, how formidable soever they might be; if rebellion was the certain consequence, we are bound to say ‘Fiat justitia, ruat cælum.’ The constitution trusts the King with reasons of state and policy; he may stop prosecutions; he may pardon offences; it is his to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted: none of us had any hand in his being prosecuted. As to myself, I took no part (in another place) in the addresses for that prosecution. We did not advise or assist the defendant to fly from justice; it was his own act, and he must take the consequences. None of us have been consulted, or had anything to do with the present prosecution. It is not in our power to stop it; it was not in our power to bring it on. We cannot pardon. We are to say what we take the law to be; if we do not speak our real opinions, we prevaricate with God and our own consciences.

“I pass over many anonymous letters I have received. Those in print are public; and some of them have been brought judicially before the Court. Whoever the writers are, they take the wrong way. I will do my duty unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust that my temper of mind, and the color and conduct of my life, have given me a suit of armor against these arrows. If, during this King’s reign, I have ever supported his government, and assisted his measures, I have done it without any other reward than the consciousness of doing what I thought right. If I have ever opposed, I have done it upon the points themselves; without mixing in party or faction, and without any collateral views. I honor the King, and respect the people; but many things acquired by the favor of either, are, in my account, objects not worth ambition. I wish popularity; but it is that popularity which follows, not that which is run after; it is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong upon this occasion, to gain the huzzas of thousands, or



the daily praise of all the papers which come from the press: I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion and under circumstances not unlike, 'Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem.'

"The threats go further than abuse; personal violence is denounced. I do not believe it; it is not the genius of the worst of men of this country, in the worst of times. But I have set my mind at rest. The last end that can happen to any man never comes too soon, if he falls in support of the law and liberty of his country (for liberty is synonymous to law and government.) Such a shock, too, might be productive of public good; it might awake the better part of the kingdom out of that lethargy which seems to have benumbed them; and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.

"Once for all, let it be understood that no endeavors of this kind will influence any man who at present sits here. If they had any effect, it would be contrary to their intent; leaning against their impression, might give a bias the other way. But I hope, and I know, that I have fortitude enough to resist even that weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is entitled to from substantial law and justice, but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection. The only effect I feel from such outrages is an anxiety to be able to explain the grounds upon which we proceed; so as to satisfy all mankind that a flaw of form given way to in this case, could not have been got over in any other."<sup>1</sup>

He then pointed out the fatal objection to the proceedings which had escaped the counsel for the defendant, and judgment was given that the outlawry should be reversed. This was [A. D. 1770.] heard with reverential silence.

Wilkes had still to be sentenced upon the two convictions, and on a subsequent day he was fined 1000*l.* and ordered to be imprisoned a year and ten months. He brought a writ of error in the House of Lords, contending that the informations had not been duly filed, and that Lord Mansfield had improperly allowed them to be amended; but the judgment of the Court of King's Bench was affirmed; and, however much

<sup>1</sup> Lord Brougham says,—“It would be difficult to overrate the merit of the celebrated address to the public, then in a state of excitement almost unparalleled, with which he closed his judgment upon the application to reverse Wilkes's outlawry. Great elegance of composition, force of diction, just and strong but natural expression of personal feelings, a commanding attitude of defiance to lawless threats, but so assured and so tempered with the dignity which was natural to the man, and which here, as in all other occasions, he sustained throughout, all render this one of the most striking productions on record.”—*Statesmen*, i. 121.

he might be aggrieved by the resolutions of the House of Commons unconstitutionally disqualifying him from being a representative of the people, he was bound to admit that justice was ever purely and impartially and mildly administered to him in the courts of law.<sup>1</sup>

Although Lord Mansfield had ceased to be a member of the Cabinet, he by no means withdrew from politics. Yet he never allied himself with any opposition party. Avowing himself to be a friend to prerogative, he attacked all measures that had an over-liberal aspect, from whatever quarter they came; and while his principles were called arbitrary, it was allowed that he maintained them with independence.

When the disputes began with America, he boldly contended both for the justice and the expediency of the tax imposed by [A. D. 1765–1768.] the mother country on the colonies towards the expense of defending them. This opinion is now considered erroneous, but all must agree with him in condemning the vacillating policy then pursued, by which resistance was encouraged, repose and mutual confidence became impossible, insult was offered when injury was redressed, and placable petitioners were turned into inveterate rebels.

The original Stamp Act, which was destined to produce such mighty effects, when introduced by George Grenville passed both Houses almost without an observation, and was unknown to the English public till they heard of the determination to disobey it. The first grand debate on the subject seems to have been when the Rockingham administration proposed resolutions for repealing it and for asserting the right to impose it. Lord Camden made his maiden speech in the House of Lords, supporting the first, but strongly condemning the last not only as imprudent but false; allowing the supremacy of the British legislature over the colonies for all purposes except taxation, but insisting that taxation and representation must go together, and that, the colonies being unrepresented in our House of Commons, any attempt to impose a tax upon them was illegal. Lord Mansfield revised and published his powerful speech in answer. Thus he propounded his doctrine of virtual representation, which was afterwards so much relied upon;—

“There can be no doubt but that the inhabitants of the colonies are represented in parliament, as the greatest part of the people of England are represented; among nine millions of whom, there are eight who have no votes in electing members of parliament. Every objection, therefore, to the dependency of the colonies upon parliament, which arises to it upon the ground of representation, goes to the whole present constitution of Great Britain; and I suppose it is not meant to new-model that, too. People may form their own speculative ideas of perfection, and indulge their own fancies or those of other men. Every man in this country has his particular notions of liberty; but perfection never did, and never can, exist in any human institution. For what purpose then, are arguments drawn from a distinction in which there is no real difference, of a virtual and actual representation? A member of parliament, chosen for any borough, represents not only the constituents

<sup>1</sup> 4 Burr. 2527—2578.; 19 St. Tr. 1075—1138.

and inhabitants of that particular place, but he represents the inhabitants of every other borough in Great Britain. He represents the city of London, and all the other commons of this land, and the inhabitants of all the colonies and dominions of Great Britain; and is in duty and conscience bound to take care of their interests."

Having treated the subject at very great length, in the vain hope of convincing all his hearers, and extinguishing that sympathy in England for the Americans which was the true cause of their resistance, he concluded with this impressive warning:—

"You may abdicate your right over the colonies. Take care, my Lords, how you do so, for such an act will be irrevocable. Proceed then, my Lords, with spirit and firmness; and, when you shall have established your authority, it will then be a time to show your lenity. The Americans, as I said before, are a very good people, and I wish them exceeding well; but they are heated and inflamed. The noble and learned Lord who preceded me concluded with a prayer; I cannot conclude better than by saying to it AMEN! and in the words of Maurice, Prince of Orange, concerning the Hollanders, 'God bless this industrious, frugal, and well-meaning, but easily-deluded people!'"<sup>1</sup>

Lord Mansfield, without entering into systematic opposition, had been much alienated from the Court both during Lord Rockingham's first administration, and that strange pieballed affair called "Lord Chatham's second administration," when the supposed prime minister, holding the privy seal, was generally secluded from all society, and knew nothing of public measures except from the newspapers. The Chief Justice's only considerable public exhibition during this period was his attack upon the unconstitutional doctrine of Lord Chatham and Lord [DEC. 1766.] Camden, that, in a case of great public emergency, the Crown could by law dispense with an act of Parliament. The question arising from the embargo upon the exportation of corn, in consequence of apprehended famine, he proved triumphantly that, although the measure was expedient and proper, it was a violation of law, and required to be sanctioned by a bill of indemnity.<sup>2</sup> Thus the supposed favorer of prerogative gained a decided victory over those who prided themselves in being considered the advocates of popular rights.

When Lord Chatham at last resigned, Lord Mansfield was called in to advise the Duke of Grafton, who was carrying on the government on Tory principles, persisting in the taxation [OCT. 1768.] of America by the British Parliament, and in disqualifying Wilkes by a vote of the House of Commons.

The two Houses being assembled in January, 1770, Lord Chatham, restored to the vigorous exercise of his faculties, opened [A. D. 1770.] a furious opposition to the Government; and Lord Camden, still holding the great seal, cordially coalesced with him. By

<sup>1</sup> Holliday, 242.; 16 Parl. Hist. 172.

<sup>2</sup> 16 Parl. Hist. 260. This doctrine, acted upon in 1827, during the administration of Mr. Canning, and on several subsequent occasions, is now universally taken for constitutional law.



Lord Mansfield's advice, a resolution was formed to dismiss Lord Camden from his office. But a tremendous difficulty arose in finding a successor to him. The King and the Duke of Grafton repeatedly urged Lord Mansfield himself to become Chancellor; but, whatever his inclination may have been when Lord Bute was minister, in the present rickety state of affairs he peremptorily refused the offer, and, on the contrary, suggested that the great seal should be given to Charles Yorke, who had been afraid that he would snatch it from him. By Lord Mansfield's advice it was that the King sent for Charles Yorke, and entered into that unfortunate negotiation with him which terminated so fatally,—occasioning the comparison between this unhappy man, destroyed by gaining his wish, and Semele perishing by the lightning she had longed for.<sup>1</sup> The Chief Justice was again implored to condescend to become Chancellor, but he insisted upon the seal being put into commission; and he named three commissioners, over whom he was supposed to exercise unbounded influence, and whose decrees he was afterwards said to dictate.<sup>2</sup>

For some months he presided on the woolsack as Speaker of the House of Lords, and, in point of fact, exercised almost all the functions belonging to the office of Lord Chancellor. He maintained his ascendancy even when, on the retreat of the Duke of Grafton, Lord North was, [JAN. 28.] with his concurrence, placed at the head of the Treasury; although this minister, as he established himself in the favor of the Sovereign and in the confidence of the Parliament, gradually escaped from the thralldom under which he had commenced his ministerial career.

During the whole of the stormy session of 1770, the Chief Justice acted a very conspicuous part; and conflicts, similar to those between Pitt and Murray in the House of Commons, were nightly witnessed between Chatham and Mansfield in the House of Lords.

The "Great Patriot," having with all his ancient energy resumed his favorite post as leader of the Opposition, and moved as an amendment, in the debate on the address, "that this House would take into consideration the proceedings of the House of Commons touching the incapacity of John Wilkes, Esq., whereby the electors of Middlesex were deprived of their free choice of a representative,"—

"Lord Mansfield said: "I have never delivered any opinion on the legality of the proceedings of the House of Commons on the Middlesex election; nor, whatever expectations may be formed, will I now declare my sentiments. They are locked up in my own breast, and shall die with me. I wished to avoid all allusion to the subject, but the amendment moved is of a nature so extraordinary and alarming as to preclude the possibility of my remaining silent. I acknowledge the distracted state of the nation, but am happy to affirm, with a safe conscience, that it can in no respect be attributed to me. Declarations of law made by

<sup>1</sup> Horace Walpole's Letter to Sir H. Mann, Jan. 22, 1770.

<sup>2</sup> Mr. Justice Bathurst (afterwards Lord Bathurst), Mr. Justice Aston and Mr. Baron Smyth.



either House of Parliament are always attended with bad effects. I constantly oppose them when I have an opportunity; and never, in my judicial capacity, think myself bound to honor them with the slightest regard. There is a wide distinction between general declarations of law and particular decisions which may judicially be pronounced by either House on a case regularly submitted to their discussion and properly the subject of their jurisdiction. A question relating to the seat of one of their members can only be determined by that House, nor is there any appeal from their decision. Wherever a court of justice is supreme, as the House of Commons in matters of election, the determination of that court must be received and submitted to as the law of the land. If there be no appeal from the judicial sentence, where shall it be questioned, and how shall it be reversed? I avoid entering into the merits of the late election from a conviction that your Lordships have no right to inquire into them. The amendment threatens the most pernicious consequences, as it manifestly violates every form and law of Parliament, must stir up a quarrel between the two Houses, and may entirely destroy the balance of the constitution."

Lord Chatham, though not entitled to address the House a second time, immediately rose, and spoke as follows, at first in a tone of constrained calm, but soon bursting into fury:—

"So alluded to by the noble and learned Chief Justice of the King's Bench, I must beg the indulgence of your Lordships. No man is better acquainted with his great abilities and great acquirements than I am, or has higher respect for them. I have had the pleasure of sitting with him in the other House of Parliament, and I have often felt his power. But on the present occasion I meet him without fear. The constitution has already been openly invaded, and I have heard with horror and astonishment that invasion defended upon principle. What is this mysterious power, undefined by law, which we must not approach without leave, nor speak of without reverence; which no man may question, and to which all men must submit? I thought the slavish doctrine of passive obedience had long since been exploded; and, when our kings are obliged to confess that their title to the crown and the rule of their government have no other foundation than the known laws of the land, I never expected to hear a divine right or a divine infallibility attributed to any other branch of the legislature. Power without right is the most odious and detestable object that can be offered to the human imagination; it is not only pernicious to those who are subject to it, but tends to its own destruction. It is, as Lyttleton has truly described it, *res detestabilis et caduca*. I acknowledge the just power, and reverence the true privileges, of the House of Commons. For their own sake I would prevent their assuming a jurisdiction which the constitution has denied them, lest, by grasping at an authority to which they have no right, they should forfeit that which they legally possess. But I affirm they have violated the constitution, and betrayed their constituents. Under pretence of declaring law, they have made a law, and united in the same persons the offices of legislator and judge. What, then, are all the generous efforts of our

ancestors—are all those glorious contentions by which they meant to secure to themselves, and transmit to their posterity, a known law, a certain rule of living, reduced to this conclusion, that, instead of the arbitrary power of a King, we must submit to the arbitrary power of a House of Commons? If this be true, what benefit do we derive from the exchange? Tyranny is detestable in every shape, but in none is it so formidable as where it is assumed and exercised by a number of tyrants.”—After highly applauding the ancient nobility as founders of the constitution, and pointing out how their work was now threatened by the subtleties of lawyers, he thus concluded, casting a scornful glance at Lord Mansfield: “Those *iron* barons (for so I may call them when compared with the silken barons of modern days<sup>1</sup>) were the guardians of the people; yet their virtues were never engaged in a question of such importance as the present. A breach has been made in the constitution; the battlements are dismantled; the citadel is open to the first invader; the walls totter. What remains, then, but for us to stand foremost in the breach, to repair or perish in it?”

Lord Mansfield did not attempt any reply, and the amendment was negatived without a division.<sup>2</sup>

Nevertheless, Lord Chatham actually laid on the table of the House [MAY 1.] of Lords a bill to reverse the decision of the House of Commons by which Colonel Luttrell, with a small minority of votes, was declared the lawful representative for the county of Middlesex, on the ground that Mr. Wilkes, who had the majority, was ineligible. On this occasion he inveighed with increased violence against the arbitrary proceedings of the lower House, exclaiming,—

“Eye on’t! O fye! ’tis an unweeded garden  
That grows to seed; things rank and gross in nature  
Possess it merely.”

He then darted at another quarry :

“My Lords, I am apprehensive—I am too apprehensive—that these waters of bitterness have their source too near the palace. [Lord Pomfret called him to order, but he continued.] My Lords, I do not retract my words. Though I shall never abet the clamors of faction, I will ever stand forth an advocate for the just rights of the people; and, while I am able to crawl upon the surface of this globe, I will pledge myself to their cause, conscious that it must be the cause of liberty and virtue. I esteem the King in his personal capacity; I revere him in his political one; and I hope he will show his regard for the principles which placed his family on the throne, by dissolving a House of Commons which has forgotten from whom it originated and for what purpose it was created, —sporting with the most sacred rights of the people, and abetting the tyranny of those whom it ought to control and to punish.”

Lord Mansfield’s faculties, instead of being excited, seem to have been paralyzed by this ebullition. He was expected to follow imme-

<sup>1</sup> I know not whether he alluded to the black silk robe which Lord Mansfield and other law lords always wore when attending the House.

<sup>2</sup> 16 Parl. Hist. 644—666.

ately, but he remained silent, and, after a long pause, the friends of the bill called out "Question!" "Divide!" He was at last forced up; but laboring, I presume, under a consciousness of the badness of his cause, spoke in a style characterized as "frigid and pettifogging." He denied that Colonel Luttrell was in a minority, as that candidate had 296 votes to *nothing*; for the 1143 votes nominally given for Mr. Wilkes, being given for a candidate who was known to be disqualified, were "*thrown away*," and were no votes at all. Notwithstanding the instance of Sir Robert Walpole, who had been re-elected immediately after having been expelled, he maintained that, according to understood law and usage, a person expelled could not be re-elected in the same parliament, whatever right he might have after a dissolution. Having pretty well disclosed the secret which he said was to die with him, he unaccountably added, "What part I took previously in this matter shall ever remain with myself: I have, I must confess, deposited it in the breast of one of the royal family, but, resting secure in that confidence, it shall never be disclosed to another." He recapitulated his arguments to show that the judgment of the House of Commons on this subject, right or wrong, could not be questioned elsewhere; and he tried to rally his spirits as he concluded with these observations:—"But suppose your Lordships coincide with the motion,—suppose we all agreed *nem. con.* to repeal the decision of the House of Commons, and to seat Mr. Wilkes as representative for Middlesex, instead of Colonel Luttrell,—good God!—what may be the consequence? The people are violent enough already, and to have the superior branch of the legislature join them would be giving such a public encouragement to their proceedings that I almost tremble while I even suppose such a scene of anarchy and confusion."

These observations were very roughly handled by Lord Camden and other peers who followed; and the Parliamentary History adds, "Lord Shelburne, in a severe speech upon the Ministry, endeavored to call up Lord Mansfield again, but it was impossible." The bill was rejected on the second reading, by a majority of 89 to 43.<sup>1</sup> Nevertheless, the Opposition exulted on account of the discomfiture of Lord Mansfield, which they reckoned the omen of future triumphs to their party, and they made a run at him, thinking still further to lower his authority, by sneering at him on all occasions, as well as by openly assailing him.—But speedily his nerves were restrung, and he was again the bold and formidable champion of the Government. Lord Chatham, in an unlucky moment venturing to treat the question of the Middlesex election *legistically*, had asserted in a very authoritative tone that "actions would lie against the whole House of Commons for having unseated Wilkes, and deprived the electors of the county of Middlesex of their franchise." He was asked, "Who are to be plaintiffs? and are the defendants to be sued as a corporation or as individuals?—how is the distinction to be made between the members who voted in the majority and in the minority?—by what evidence are their votes either way to be proved?—how is the defence to be conducted?—out of what fund are the

<sup>1</sup> 16 Parl. Hist. 955-966.



damages to be paid?—and how are illiterate juries thenceforth to be prevented from being judges of all the privileges of Parliament?”—Lord Chatham’s reckless disregard of such considerations caused exceeding joy to Mansfield, who exclaimed, “The Lord has delivered him into my hand!” and for a long time made this supposed right of action against the House of Commons the burden of his song.<sup>1</sup>

Lord Chatham thought he would have his revenge by trying to raise a laugh against Lord Mansfield for his supposed sudden conversion to the liberal side, and for trying to please the mob by supporting the bill to take away the protection which peers’ servants had hitherto enjoyed against being sued for their debts while Parliament was sitting. The Chief Justice, after ably defending the principle of the bill, asked, [MAY 9.] “Shall it be said that you, my Lords, the grand council of the nation, the highest judicial and legislative body of the realm, endeavor to evade by privileges those very laws which you impose upon your fellow-subjects! Forbid it, justice! The law ought to be equally open to all: any exception to particular men, or particular ranks of men, is, in a free and commercial country, a solecism of the grossest nature.” There being a suppressed titter at the expression of these sentiments by the defender of the disfranchisement of Middlesex, he turned round to Lord Chatham, and, eyeing him with calm resolution, thus addressed him:—

“It has been imputed to me by the noble Earl on my left hand that I, too, am running the race of popularity. If the noble Earl means by *popularity* the applause bestowed by after-ages on good and virtuous actions, I have long been struggling in that race,—to what purpose all-trying time can alone determine; but if he means that mushroom popularity which is raised without merit, and lost without a crime, he is much mistaken. I defy the noble Earl to point out a single action in my life where the popularity of the times ever had the smallest influence upon my determination. I thank God I have a more permanent and steady rule for my conduct—the dictates of my own breast. Those who have foregone that pleasing adviser, and given up their minds to the slavery of every popular impulse, I sincerely pity; I pity them still more if vanity leads them to mistake the shouts of a mob for the trumpet of Fame. Experience might inform them that many who have been saluted with the huzzas of a crowd one day, have received its execrations the next; and many who, by the fools of their own times, have been held up as spotless patriots, have, nevertheless, appeared on the historian’s page,

<sup>1</sup> Very vague notions seem to have prevailed in those days respecting legal remedies. A citizen of London brought to trial an action before Lord Mansfield to recover back the sum he had been obliged to pay for taxes to the King, on the ground that, the county of Middlesex not being properly represented, the House of Commons had no right to tax the people, and all laws made by Parliament were void. Of course he was speedily nonsuited, and reprimanded for his presumption.—(1 *Evans*, 34.) During the passing of the Reform Bill, in 1832, some hot-headed and absurd men talked of a refusal to pay taxes if the bill should be rejected; but this they meant as an act of resistance to authority, not as what they could justify in a court of law.



when truth has triumphed over delusion, the assassins of liberty. Why, then, can the noble Earl think I am ambitious of present popularity—the echo of flattery and counterfeit of renown?"

The bill passed without further observation,<sup>1</sup> and Lord Mansfield proved that, although he might be attacked unsparingly for the doctrines which he laid down, he had it in his power, by a proper display of spirit, to secure for himself the respect and courtesy due to his station.

But he was greatly disappointed if he expected that he was henceforth to enjoy tranquility. He was now entering the most tempestuous period of his whole life.

JUNIUS having, with unbounded applause and entire impunity, libelled for a twelvemonth the Duke of Grafton, then at the head of the Treasury, and other distinguished public [DEC. 19, 1769.] characters, at last addressed a letter to the King himself, which, with some wholesome truths, contained insinuations and charges against his Majesty's conduct and personal honor which must have been very hurtful to his feelings, and tended strongly to deprive him of the esteem and affection of his subjects. Such an outrage must be condemned by all right-thinking persons, as not only contrary to the letter of the law, but as unconstitutional, mischievous, and dastardly. The fiction that the King can do no wrong, ought to be respected as the foundation of responsible government, and favorable to liberty as well as order. Public acts should all be presumed to proceed from the advisers of the Crown; and the private life of the Sovereign should be held still more sacred than that of the multitude, which factious opposition has agreed to spare. For calumny and insult he has not, like a subject, a remedy either by an appeal to the law or by taking the law into his own hand.

The Attorney General very properly I think) filed criminal informations against Woodfall, who first published the letter, and against Almon and Miller, who immediately reprinted it. A licenser is not to be endured, and the utmost freedom should be given to fair discussion; but it betrays gross ignorance of the principles by which order is to be preserved in society, to contend that no control is to be exercised by the magistrate over the publications which issue from the press. Not only is protection due to the characters of individuals, but no government can stand,—democratical or monarchical,—whatever may be its form—against daily attacks upon its fundamental institutions, and daily exhortations to rise and subvert it. The right of insurrection, which may be resorted to as the last remedy against tyranny and oppression, can never be recognized by any code, or pleaded in any court of justice.

*Rex v. Almon* was the first case brought to trial; and here, without any denial that the letter was a libel, the great point [JAN. 2, 1770.] made was, that the evidence was insufficient to render the defendant liable as publisher. A copy was produced which had his name in the title-page as publisher, and which had been bought at his shop from a person acting there as his servant. *Serjeant Glyn* his counsel, urged that a man cannot be made a criminal by the act of his

<sup>1</sup> 16 Parl. Hist. 497—978.

servant ; but Lord Mansfield ruled that a sale by the servant was *primâ facie* evidence of a publication by the master, on the principle *qui facit per alium, facit per se* ; and the jury found a general verdict of GUILTY. In the ensuing term a motion was made for a new trial, on the ground that there was no proof of *criminal intention* on the part of the defendant, or that he even knew of the letter from JUNIUS to the King having been in his shop, or even having been printed or written.

*Lord Mansfield* : “ I continue to think that the buying of a pamphlet in the open shop of a professed bookseller and publisher of pamphlets, from a person acting in the shop, is *primâ facie* evidence of a publication by the master himself ; but it is liable to be contradicted where the fact will permit, by contrary evidence tending to exculpate the master and to show that he was not privy nor assenting to it. Thus the evidence stands good till answered, and, not being answered at all, conclusively supports the conviction.”—The other Judges concurred, and a rule to show cause was refused.<sup>1</sup>

This decision of the court was clamorously condemned by the newspapers, and was even commented upon very harshly by Mr. Dunning in the House of Commons :<sup>2</sup> but it is clearly according to law and reason ; for, if proof were required of the personal interference or express sanction of the master, libels might be published with entire impunity, and the admission of evidence to rebut the presumption affords ample protection for innocence. Afterwards, in the “Reign of Terror,” upon the outbreak of the first French Revolution, the doctrine was grossly perverted, and judges refused evidence to prove that libellous articles had been inserted in newspapers when the registered proprietor, who was *primâ facie* answerable, was not only lying unconsciously sick in bed at the time of the publication, but had given express orders to the acting editor that the articles should not be admitted. The recurrence of such iniquity is for ever prevented by “Lord Campbell’s Libel Act,” which saves the master from criminal responsibility for an unauthorized publication by the servant.<sup>3</sup>

When the trial against Woodfall, the printer of the MORNING ADVERTISER, came on, there being no doubt respecting the defendant’s liability as publisher, an attempt was made to persuade the jury that the letter was not libellous ; and the grand dispute arose, whether this was a question for the jury, or exclusively for the court ?

Lord Mansfield said, “ All the jury had to consider was, whether the defendant had published the letter set out in the information, and whether the *innuendoes* imputing a particular meaning to particular words, as that ‘the K——’ meant his majesty King George III. ; but that they were not to consider whether the publication was, as alleged in the information, ‘false and malicious,’ these being mere formal words ; and that whether the letter was libellous or innocent was a pure question of law, upon which the opinion of the court might be taken by a demurrer, or a motion in arrest of judgment.”

<sup>1</sup> Burr. 2686 ; 26 St. Tr. 803.

<sup>2</sup> 16 Parl. Hist. 1279.

<sup>3</sup> 6 & 7 Vic. c. 96, s. 7.

The jury retired, and after staying out many hours, having been brought in hackney coaches from Guildhall to Lord Mansfield's house in Bloomsbury Square, the foreman gave their verdict in these words, "GUILTY of the printing and publishing ONLY."

In the ensuing term, cross-rules were obtained by the Attorney General and by the defendant to ascertain the legal result of this finding; the one contending that it amounted to a conviction, and the other to an acquittal. After the cause had been very elaborately argued, Lord Mansfield said,—

"Had the verdict been simply 'guilty of printing and publishing,' we should have thought that it ought to be entered generally for the Crown; but we cannot exclude the word 'only,' and this appears to negative something charged in the information which the jury thought was submitted to them. Where there are more charges than one, 'guilty of some ONLY' is an acquittal as to the rest; but in this information there is no charge except for *printing and publishing*: clearly there can be no judgment of acquittal, because the fact found against the defendant by the jury is the very crime they had to try. That the law is as I stated to the jury has been so often unanimously agreed by the whole Court, upon every report I have made of a trial for a libel, that it would be improper to make it a question now in this place. Among those who have concurred, the bar will recollect the *dead*, and the *living not now here*.<sup>1</sup> And we all again declare our opinion that the direction was right and according to law. Can any meaning be affixed to the word 'only' which may affect the verdict? If they meant to say, 'they did not find it a libel,' or 'did not find the epithets false and malicious,' it would not affect the verdict, because none of these things were to be proved or found either way. It is impossible to say with certainty what the jury really did mean. Probably they had different meanings. It is possible some of them might mean not to find the whole sense put upon part of the words by the *innuendoes* in the information. If there be a meaning favorable to the defendant which by possibility the words will bear, he ought not to be concluded. Therefore we order the verdict to be set aside, and there shall be a new trial."

Woodfall was henceforth secure, for it was well known that no jury in the city of London would find a verdict against the publisher of JUNIUS, whatever they might be told from the bench as to their functions or their duties.

Before this judgment had been given, the information against *Miller* had been tried at Guildhall, when Lord Mansfield, in a very [JULY 18.] solemn and peremptory tone, spoke as follows:—

"I have the satisfaction to know, that if I should be mistaken in the direction I am about to give as to your duty on the present occasion, it will not be final and conclusive; but under the full conviction of my own mind that I am warranted by the uniform practice of past ages, and by the law of the land, I inform you that the question for your determination is, whether the defendant printed and published a paper

<sup>1</sup> I suppose meaning Mr. Justice Yates.



of such tenor and meaning as is charged by the information? If the tenor had been wrong, the prosecution would at once have fallen to the ground; but that is not objected to, nor is any meaning suggested by the defendant different to that supplied by the filling up the blanks in the information. If you find the defendant *not guilty*, you find that he did not print or publish as set forth: if you find him *guilty*, you find that he did print and publish a paper of the tenor and meaning set forth in the indictment. Your verdict finally establishes that fact; but you do not by that verdict find whether that production was legal or illegal: for should the defendant be found guilty, he may arrest the judgment, by insisting there is nothing illegal in this paper, and may carry this matter before the highest court of judicature in the kingdom."

With strange incongruity he added,—

"If you choose to determine the point of law, you should be very sure for our conscience' sake, that your determination is law; but if the law was in every case to be determined by juries, we should be in a miserable condition, as nothing could be more uncertain, from the different opinions of mankind."

Half the population of London were assembled in the streets surrounding Guildhall, and remained several hours impatiently expecting the result. Lord Mansfield had retired to his house, and many thousands proceeded thither in grand procession when it was announced that the jury had agreed. At last a shout, proceeding from Bloomsbury Square and reverberated from the remotest quarters of the metropolis, proclaimed a verdict of NOT GUILTY.<sup>1</sup>

Lord Mansfield, in the course of these trials, had done nothing to incur moral blame. I think his doctrine, that the jury were only to find the fact of publication and the *innuendoes*, contrary to law as well as liberty. His grand argument for making the question of "libel or not" exclusively one of law, that the defendant may demur or move in arrest of judgment, and so refer it to the court, admits of the easy answer, that, although there may be a writing set out in the information as libellous which it could under no circumstances be criminal to publish, yet that an information may set out a paper the publication of which may or may not be criminal, according to the intention of the defendant and the circumstances under which it is published. Therefore, supposing judges to be ever so pure, upright, and intelligent, justice could not be done by leaving to them the criminality or innocence of the paper alleged to be libellous as a mere abstract question of law to be decided by reading the record. Nevertheless there were various authorities for the rule which Lord Mansfield had laid down; and, in laying it down, he not only followed the example of his immediate predecessors, but he was supported by the unanimous opinion of his brethren who sat by him. There was no pretence for representing him as a daring innovator, who, slavishly wishing to please the Government, tried to subvert trial by jury and to extinguish the liberty of the press. Nevertheless he was

<sup>1</sup> 20 St. Tr. 896.



very generally believed to have acted corruptly,<sup>1</sup> and having been coarsely compared by vulgar vituperators to *Jeffreys* and *Scroggs*, he was thus addressed in more pointed, polished, and venomous terms by JUNIUS himself:—

“Our language has no term of reproach, the mind has no idea of detestation, which has not already been happily applied to you, and exhausted. Ample justice has been done by abler [Nov. 14.] pens than mine to the separate merits of your life and character. Let it be *my* humble office to collect the scattered sweets till their united virtue tortures the sense.

“Permit me to begin with paying a just tribute to Scotch sincerity wherever I find it. I own I am not apt to confide in the professions of gentlemen of that country; and, when they smile, I feel an involuntary emotion to guard myself against mischief. With this general opinion of an ancient nation, I always thought it much to your Lordship’s honor that, in your earlier days, you were but little infected with the prudence of your country. You had some original attachments which you took every proper opportunity to acknowledge. The liberal spirit of youth prevailed over your native discretion. Your zeal in the cause of an unhappy prince was expressed with the sincerity of wine, and some of the solemnities of religion. This, I conceive, is the most amiable point of view in which your character has appeared. Like an honest man, you took that part in politics which might have been expected from your birth, education, country and connexions. There was something generous in your attachment to the banished House of Stuart. We lament the mistake of a good man, and do not begin to detest him until he affects to renounce his principles. Why did you not adhere to that loyalty you once professed? Why did you not follow the example of your worthy brother? With him you might have shared in the honor of the Pre-

<sup>1</sup> The perverted state of the public mind we may learn from Horace Walpole’s Memoirs of the Reign of George III., which were written at the time, not for any factious purpose, but to remain unpublished till a future age, and which accordingly did not see the light till the year 1845:—“Lord Mansfield endeavoured, by the most arbitrary constructions, to mislead the jury, telling them that they had nothing to do with the *intention*, nor with the words in the indictment—*malicious, seditious, &c.* The despotic and Jesuitic judge went farther. He said the business of the jury was to consider whether the blanks were properly filled up? As to the contents of the paper, whether true or false, they were totally immaterial. No wonder juries were favourable to libellers, when the option lay between encouraging abuse and torturing law to severe tyranny! It did the jury honour that they preferred liberty to the voice of the Inquisition. Not content with open violations of justice, he carried the jurors home with him, though without effect. What criminal could be more heinously guilty than such a judge?” (Vol. iv. p. 159, 160.) For the last insinuation,—that the Judge, not being able to prevail upon the jury to find a false verdict in open court, carried them home with him to corrupt them by a good dinner and plenty of wine,—had this foundation, that the jury, having been locked up at Guildhall without meat, drink, or fire, till they had agreed on their verdict, were, according to the usual practice, which in this case was expressly sanctioned by the counsel on both sides, brought before the Judge, to deliver it in his private apartments before the officers of the court and all who wished to be present.

tender's confidence; with him you might have preserved the integrity of your character; and England, I think, might have spared you without regret. Your friends will say, perhaps, that although you deserted the fortune of your liege lord, you have adhered firmly to the principles which drove his father from the throne; that, without openly supporting the person, you have done essential service to the cause, and consoled yourself for the loss of a favorite family by reviving and re-establishing the maxims of their government. This is the way in which a Scotchman's understanding corrects the error of his heart. My Lord, I acknowledge the truth of the defence, and can trace it through all your conduct. I see, through your whole life, one uniform plan to enlarge the power of the Crown at the expense of the liberty of the subject."

After specifying at very great length the supposed enormities of the Chief Justice in the prosecution of his plan, the writer comes to the recent trials for publishing his own letter to the King;—

"Here, my Lord, you have fortune on your side. When you invade the province of the jury in matter of libel, you in effect attack the liberty of the press; and, with a single stroke wound two of your greatest enemies. In other criminal prosecutions the malice of the design is confessedly as much the subject of consideration to a jury as the certainty of the fact. If a different doctrine prevails in the case of libels, why should it not extend to all criminal cases? why not to capital offences? I see no reason (and I dare say you will agree with me that there is no good one) why the life of the subject should be better protected against you than his liberty or property. Why should you enjoy the full power of pillory, fine, and imprisonment, and not be indulged with hanging or transportation?"

Having amply discussed this legal question and several others, he makes the following observations on Lord Mansfield's political position, which we shall see had a speedy influence upon ministerial arrangements:—

"Yet you continue to support an Administration which you know is universally odious, and which on some occasions you yourself speak of with contempt. You would fain be thought to take no share in government, while, in reality, you are the mainspring of the machine. Here, too, we trace the *little*, prudential policy of a Scotchman. Instead of acting that open, generous part which becomes your rank and station, you meanly skulk into the closet, and give your Sovereign such advice as you have not spirit to avow or defend. You secretly ingross the power while you decline the title of minister; and though you dare not be Chancellor, you know how to secure the emoluments of the office. Are the seals to be forever in commission that you may enjoy five thousand pounds a year?"

The writer concludes with strongly advising Lord Mansfield not to make this letter the subject of criminal informations, like his letter to the King, as "the prosecution of an innocent printer cannot alter facts nor refute arguments."

De Grey, the Attorney General, was eager for proceeding *ex officio*

against the DAILY ADVERTISER, and all the newspapers which had copied this audacious invective against the Chief Justice, urging that the administration of the laws must speedily come to an end if the first magistrate in Westminster Hall could be thus insulted on his tribunal with impunity. The Chief Justice himself, however, thought it more discreet to avoid a personal conflict, and not to keep alive the topics respecting his early history and political career which JUNIUS had so cunningly and invidiously introduced. He declared, therefore, "that he would confide in the good sense of the public and the internal evidence of his conscience."

But he felt the scandal of his remaining so long Speaker of the House of Lords, with a high salary, in addition to that of Chief Justice, and of keeping the seals in commission for a longer time than had been known since the reign of William III. The difficulty was to find a Chancellor. The fittest man would have been Dunning, who had accepted the office of Solicitor General under the Duke of Grafton; but he was known to be an enemy both to the Chief Justice and to his principles.

These perplexities were increased by his alleged encroachment on the rights of juries being brought before Parliament. Serjeant Glyn made a motion in the House of Commons for "a committee to inquire into the proceedings of the Judges in Westminster [DEC. 6.] Hall, particularly in cases relating to the liberty of the press;"—when, in the course of a long debate, the conduct of the Chief Justice was severely censured not only by the mover but by Dunning and Burke, while it was stoutly defended by De Gray the Attorney General, Thurlow the Solicitor General, and Charles Fox, still a courtier.<sup>1</sup>

In the House of Lords there was a close compact between Lord Chatham and Lord Camden against Lord Mansfield; and he had no one to give him the slightest assistance in debate, although on a division he had numbers on his side. In the course of a renewed discussion which now took place on the Middlesex election, Lord Chatham "made a digression upon the modern manner of directing a jury from the bench, and giving judgment upon prosecutions for libels."<sup>2</sup>

*Lord Mansfield*: "It is extremely painful, my Lords, where a man is publicly attacked, not only to have prejudice to contend with, but ignorance; I say *ignorance*, because, highly as I respect the abilities of my accuser in other matters, this is a point on which he is entirely destitute of information; indeed, so destitute, that, were I not apprehensive my silence might be liable to misconstruction, I should not have distinguished him with the attention of a reply. The noble Lord is pleased to say that the constitution of the country has not only been wounded in the House of Commons in the material right of election, but in the Court of King's Bench by the immediate dispensers of the law. His Lordship tells the House that doctrines no less new than dangerous have been inculcated in this court, and that particularly in a charge which I delivered to the

<sup>1</sup> 16 Parl. Hist. 1211—1302.

<sup>2</sup> *Ibid.* 1302. We only learn the particulars of the charge from the answer, which is given at length.

jury on Mr. Woodfall's trial my directions were contrary to law, repugnant to practice, and injurious to the dearest liberties of the people. This is an alarming picture, my Lords; it is drawn with great parade, and colored to affect the passions amazingly. Unhappily, however, for the painter, it wants the essential circumstance of truth in the design, and must, like many other political pictures, be thrown, notwithstanding the reputation of the artist, among the miserable daubings of faction. So far, my Lords, is the accusation without truth, that the directions now given to juries are the same as they have ever been. There is no novelty introduced,—no chicanery attempted; nor has there till very lately been any complaint of the integrity of the King's Bench. When, indeed, the abettors of sedition found that the judges were neither to be flattered from their duty by fulsome adulation, nor intimidated by the daring voice of licentiousness—when they found that Justice was not afraid of drawing her sword against the greatest favorite of an inconsiderate multitude—they had no resource but to impeach the probity of her ministers; to acknowledge the equity of any sentence against themselves would be to give up their pretensions to patriotism. What, therefore, was to be done? To traduce the judges,—to represent them as the servile tools of every arbitrary minister,—to hold out every criminal as a martyr to the public good, and to excite a general abhorrence of all legal subordination.”

Having vindicated himself at great length by a review of the authorities and arguments connected with the case, he said he had directed juries in the same manner for fourteen years, without any objection being made to the rule he laid down, although he had often requested that if any doubt existed the opinion of a higher court might be taken. He thus concluded:—

“Judges, my Lords, cannot go astray from the express and known law of the land. They are bound by oath punctually to follow the law. I have ever made it the rule of my conduct to do what was just; and, conscious of my own integrity, am able to look with contempt upon libels and libellers. Before the noble Lord, therefore, arraigns my judicial character, he should make himself acquainted with facts. The scurrility of a newspaper may be good information for a coffee-house politician; but a peer of parliament should always speak from higher authority; though, if my noble accuser is no more acquainted with the principles of law in the present point than in what he advanced to support the motion where he told us *an action would lie against the House of Commons for expelling Mr. Wilkes*, I am fearful the highest authorities will not extend his ideas of jurisprudence nor entitle him to a patient hearing upon a legal question in this assembly.

Lord Chatham tried to reply, but could make nothing of his action for damages against the House of Commons, and was obliged to retreat upon the Middlesex election, which he said “he should consider the alarm-bell of liberty; ringing it incessantly till he roused the people to a proper sense of their injuries.”

Lord Camden then came to the rescue, and gave a flagrant instance



of the little reliance to be placed on the law laid down in debate by experienced lawyers; for he stoutly argued that the action against the House of Commons might be maintained:—

“The noble and learned Lord on the woolsack has been pleased to sneer at my illustrious friend on account of his unacquaintance with the law, in saying that ‘an action for damages lies against the House of Commons for disfranchising the county of Middlesex.’ The noble and learned Lord, however, triumphs without a victory. If he supposes the laws of this country founded on justice, he must acknowledge the propriety of the very observation which excites his ridicule. Will he venture to say that, in seating Colonel Luttrell, the freeholders have not been grossly and dangerously injured? Will he venture to say that, being injured, they have not a legal claim to redress?—a title to compensation at the hands of a jury for the wrong they have sustained? He knows they have; he cannot deny their claim, unless he places the simple resolution of the other House entirely above the established law of the land, and tells us that the lowest estate of parliament is constitutionally warranted to annihilate the constitution. With respect to the direction of the noble and learned Lord on the woolsack, which my illustrious friend has referred to, I think it would be premature to give any opinion till we have it before us. If we can obtain this direction, and obtain it fully, I shall very readily deliver my opinion upon the doctrines it inculcates; and if they appear to me contrary to the known and established principles of the constitution, I shall not scruple to tell the author of his mistake boldly and openly in the face of this assembly.”

A motion of adjournment made by the Duke of Grafton, as the organ of the Government, was carried by a large majority.<sup>1</sup> All present felt that Lord Mansfield had decidedly the advantage in this encounter, and that he had only to enjoy his victory. He wisely remained silent for the rest of the evening; but, elated with the compliments he received in Westminster Hall, he next day intimated that he had something of importance to bring to the notice of the House, and moved that their Lordships should be summoned to receive the communication.

On the appointed day there was an unusually large attendance of Peers. It was generally believed that the Lord Chief Justice was going to move a vote of censure on Lord Chatham and Lord [DEC. 11.] Camden for calumniating the Judges, and the coming passage of arms between them was expected to be more dazzling than any ever before witnessed. But, oh! miserable disappointment! After a long pause, during which all eyes were fixed upon Lord Mansfield, he at last rose and said,—“My Lords, I have left a paper with the clerk-assistant of this House, containing the judgment of the Court of King’s Bench in the case of *The King against Woodfall*, and any of your Lordships who may be so inclined may read it and take copies of it.” To the astonishment of the audience, he resumed his seat without making any motion or uttering a syllable more.

*Lord Camden*: “Does the noble and learned Lord on the woolsack

mean to have his paper entered on the journals, or to found any motion upon it hereafter?"

*Lord Mansfield*: "No, no! Only to leave it with the clerk."

The house then proceeded to other business; and some Peers who had a curiosity to know the contents of Lord Mansfield's paper found it entitled, "Copy of the unanimous Opinion of the Court of King's Bench in the case of the King against Woodfall, and read by the Lord Chief Justice on the 20th of November, 1770."

Next day, at the sitting of the House, Lord Camden said,—

"My Lords, I consider the paper delivered in by the noble and learned Lord on the woolsack as a challenge directed personally to me, and I accept it; he has thrown down the gauntlet, and I take it up. In direct contradiction to him I maintain that his doctrine is not the law of England. I am ready to enter into the debate whenever the noble Lord will fix a day for it. I desire and insist that it may be an early one. Meanwhile, my Lords, I must observe that, after having considered the *paper* with the utmost care, I have not found it very intelligible. There is one sense of the words in which I might agree; but there is another sense which may be imputed to them, and which they naturally bear. If this be what the noble and learned Lord will stand by, I am ready to prove it illegal and unconstitutional. I therefore beg leave to propose the following questions to the noble and learned Lord, to which I require categorical answers, that we may know precisely the points we are to discuss:—

"1. Does the Opinion mean to declare that upon the general issue of *not guilty*, in the case of a seditious libel, the jury have no right by law to examine the innocence or criminality of the paper if they think fit, and to form their verdict upon such examination?"

"2. Does the Opinion mean to declare that in the case above mentioned, where the jury have delivered in their verdict *guilty*, this verdict has found the fact only, and not the law?"

"3. Is it to be understood by this opinion that if the jury comes to the bar and say that they find the printing and publishing, but that the paper is no libel, the jury are to be taken to have found the defendant guilty generally, and the verdict must be so entered up?"

"4. Whether the Opinion means to say that if the judge, after giving his opinion of the innocence or criminality of the paper, should leave the consideration of that matter, together with the printing and publishing, to the jury, such a direction would be contrary to law?"

*Lord Mansfield* (looking very unhappy): "I have the highest esteem for the noble and learned Lord who thus attacks me, and I have ever courted his esteem in return. From his candor I had not expected this treatment.<sup>1</sup> I have studied the point more than any other in my life, and have consulted all the Judges on it except the noble and learned Lord, who appears to view it differently from all others. But this mode

<sup>1</sup> Horace Walpole says, "Lord Mansfield, with most abject soothings, paid the highest compliments to Lord Camden."—*Mem. Geo. III.*, vol. iv., p. 220.

of questioning me takes me by surprise. It is unfair. I will not answer interrogatories."

*Lord Chatham*: "'Interrogatories!' Was ever anything heard so extraordinary? Can the noble and learned Lord on the woolsack be taken by surprise when, as he tells us, he has been considering the point all his life, and has taken the opinion of all the Judges upon it?"

*Lord Camden*: "I am willing that the noble and learned Lord on the woolsack should have whatever time he deems requisite to prepare himself, but let him name a day when his answers may be given in, and I shall then be ready to meet him."

*Lord Mansfield*: "I am not bound to answer, and I will not answer, the questions which the noble and learned Lord has so astutely framed and so irregularly administered; but I pledge myself that the matter shall be discussed."

*Duke of Richmond*: "I congratulate your Lordships upon the noble and learned Chief Justice of the King's Bench having at last pledged himself to the point."

*Lord Mansfield* (much embarrassed): "My Lords, I did not pledge myself to any particular point; I only said I should hereafter give my opinion. And as to fixing a day, I said 'No! I will not fix a day.'"<sup>1</sup>

He seemed so much distressed that the matter was here allowed to drop, and it never was resumed.<sup>2</sup>

Next morning Lord Chatham sent a note to Lord Camden, complimenting him on his *transcendent doing*, inquiring after his health, and adding, "I think I ought rather to inquire how Lord Mansfield does."<sup>3</sup>

There is no denying that "the noble and learned Lord on the woolsack" did on this occasion show a great want of moral courage, and an utter forgetfulness of the [A. D. 1770-1772.] excellent precept of Polonius,—*"Beware of entrance to a quarrel: but being in, bear it that the opposer may beware of thee."*

All felt that a new disposition of the great seal could be delayed no longer, and *à pis aller*, it was given to Mr. Justice Bathurst with the title of CHANCELLOR. Although the remark made might have been anticipated,—*"that the three Commissioners were allowed to be incompetent, and the whole business of the office was thrown on the most incompetent of the three,"*—I am afraid that Lord Mansfield was not sorry to see the woolsack so occupied, hoping that his own ascendancy, as the only great Tory law lord, might remain undiminished.

However, his position there seems to have become very uncomfortable, and I can find no trace of any speech delivered by him in parliament for above four years. He was unable single handed to cope with the formidable league of Lord Chatham and Lord Camden, assisted by the Duke of Richmond and other allies; and he must have regretted the

<sup>1</sup> 16 Parl. Hist. 1321.; Walp. Mem. Geo. III., vol. iv. p. 220—225.

<sup>2</sup> Horace Walpole, who witnessed the scene, says: "the dismay and confusion of Lord Mansfield was obvious to the whole audience; nor did one peer interpose a syllable in his behalf."

<sup>3</sup> Original letter furnished to me by the present Marquess Camden.



shortsighted policy of choosing such a weak man for Chancellor as Lord Bathurst, who was incapable of giving him any aid or countenance.

JUNIUS, from the acquittal of the printers till the beginning of the year 1772, when he made a treaty with the Government and for ever disappeared, exercised a tyranny of which we can form little conception, living in an age when the press is more decorous, and we are able by law to restrain its excesses.

I may refresh the recollection of the reader by copying a few of the passages in which the victorious libeller seeks to revenge himself on Lord Mansfield for the vain attempt to bring him to justice. Thus, in the letter to the Duke of Grafton, describing the destitute condition of his Grace's party,—having said that “Charles Fox was yet in blossom,” and that “Wedderburn had something about him which treachery could not trust,”—he observes, “Lord Mansfield shrinks from his principles; his ideas of government perhaps go farther than your own; but his heart's disgraces the theory of his understanding.”<sup>1</sup> Commenting on Lord Mansfield's compliment to Lord Chatham for supporting the right of impressment, which he imputes to a design of injuring the great patriot, he says, “He knew the doctrine was unpopular, and was eager to fix it upon the man who is the first object of his fear and detestation. The cunning Scotchman never speaks truth without a fraudulent design. In council he generally affects to take a moderate part. Besides his natural timidity, it makes part of his political plan never to be known to recommend violent measures. When the guards are called forth to murder their fellow-subjects, it is not by the ostensible advice of Lord Mansfield. Who attacks the liberty of the press? Lord Mansfield! Who invades the constitutional power of juries? Lord Mansfield! Who was that judge who to save the King's brother, affirmed that a man of the first rank and quality, who obtains a verdict in a suit for criminal conversation, is entitled to no greater damages than the meanest mechanic? Lord Mansfield! Who is it makes Commissioners of the Great Seal? Lord Mansfield! Who is it frames a decree for these Commissioners deciding against Lord Chatham?”<sup>2</sup> Lord Mansfield! Compared to these enormities, his original attachment to the Pretender (to whom his dearest brother was confidential secretary) is a virtue of the first magnitude. But the hour of impeachment *will* come, and neither he nor Grafton shall escape me.”<sup>3</sup> Then arose the grand controversy about Lord Mansfield's power to bail Eyre, charged with theft, in which JUNIUS was egregiously in the wrong—clearly showing that he was not a lawyer, his mistakes not being designedly made for disguise, but palpably proceeding from an ignorant man affecting knowledge. Thus he urges Lord Camden, whom he accuses of remissness, to prosecute and to punish the delinquent Judge: “When the contest turns

<sup>1</sup> 22d June, 1771.

<sup>2</sup> Alluding to an absurd calumny that a wrong decision of the Lords Commissioners about the Pynsant estate, afterwards reversed in the House of Lords, was maliciously framed by Lord Mansfield.

<sup>3</sup> 5th October, 1771.



upon the interpretations of the laws, you cannot, without a formal surrender of all your reputation, yield the post of honor even to Lord Chatham. Considering the situation and abilities of Lord Mansfield, I do not scruple to affirm, with the most solemn appeal to God for my sincerity, that, in my judgment, he is the worst and most dangerous man in the kingdom. Thus far I have done my duty in endeavoring to bring him to punishment. But mine is an inferior ministerial office in the temple of justice. I have bound the victim and dragged him to the altar."<sup>1</sup>

There were many consultations between Lord Mansfield and his friends how these atrocious libels should be dealt with. Sir Fletcher Norton strongly recommended a prosecution, and even a summary application to commit the printer, and the author if he could be got at, for a contempt of court; but this advice was rejected, being supposed to be prompted by a desire to bring the party libelled into greater disgrace, so that he might be forced to resign, and that the adviser, who had for many years been impatient to be put on the bench (although he never accomplished his object), might succeed to the vacant Chief Justiceship. There appeared in the DAILY ADVERTISER a very able paper, signed ZENO, in defence of Lord Mansfield against all the charges JUNIUS had brought against him, which was supposed to have been written by Lord Mansfield himself; but it only drew forth a more scurrilous diatribe in the shape of a letter to ZENO from PHILO-JUNIUS,—and all hope of refuting or punishing him was abandoned as hopeless. At last “the great boar of the forest,” who had gored the King and almost all his Court, and seemed to be more formidable than any “blatant beast,” was conquered,—not by the spear of a knight-errant, but by a little provender held out to him, and he was sent to whet his tusks in a distant land.

This certainly was a very great deliverance for Lord Mansfield, who had long been afraid at breakfast to look into the DAILY ADVERTISER, lest he should find in it some new accusation, which he could neither passively submit to nor resent without discredit; and although he might call the mixture of bad law and tumid language poured out upon him *ribaldry*, it had an evident effect in encouraging his opponents in parliament, and in causing shakes of the head, shrugs of the shoulders, smiles, and whispers in private society, which could not escape his notice.

<sup>1</sup> January, 1772.

## CHAPTER XXXVII.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL THE DEATH  
OF LORD CHATHAM.

THE excessive violence of the attacks upon Lord Mansfield by JUNIUS [A. D. 1772-74.] had made their effect more transitory, and they were gradually forgotten amidst a succession of stirring events at home and abroad.

In the autumn of 1774 he paid a visit to Paris, where his nephew, Lord Stormont, had by his interest been appointed ambassador, and had shown great energy in counteracting the intrigues of the Duke d'Aguillon for French aggrandisement. Louis XVI. had just commenced his inauspicious reign, and many other distinguished Englishmen had come over to witness the festivities in honor of his accession. Lord Mansfield was presented to the King, and to the young Queen, still "glittering like the morning star, full of life and splendor and joy." He was treated by both of them with marked civility; for his reputation as a great magistrate had spread over Europe, and his noble appearance and manners added to the interest which this had excited.<sup>1</sup> Amidst the splendors of his reception at Versailles, little did he think he should live to hear the tidings of Louis and Marie Antoinette losing their heads on the scaffold.

Now was the city of London convulsed by the dispute respecting the publication of parliamentary debates,—in the course of which the messenger of the House was committed to Newgate, and the Lord Mayor to the Tower. Events of stupendous magnitude were taking place in the East Indies, where a mercantile company, at first content with a store-house in which they might expose their wares to sale, had become masters of a mighty empire. But it was America that chiefly absorbed the public attention. The scheme of taxing the colonies had [A. D. 1774-75.] been insanely resumed; Franklin had been insulted by Wedderburn; there had been riots at Boston; coercion had been tried in vain; a general spirit of resistance manifested itself from the St. Lawrence to the Mississippi,—and civil war was impending. The paltry squabbles for place which had prevailed since the resignation of Lord Bute, till the appointment of Lord North as minister, were forgotten; and the leaders of all parties, animated by nobler thoughts, deliberated upon the measures by which a sinking state might be saved from perdition. Lord Mansfield resumed his position as a political leader, and was again the chief organ of the Government in the House of Lords. Lord Bathurst, the Chancellor, seldom spoke, and never with effect. The other holders of office in the Upper House were Lord

<sup>1</sup> He was so much pleased with the recollection of this scene, that on his return he had his portrait painted in the costume which he then wore.

Sandwich, Lord Hillsborough, Lord Gower, and Lord Dartmouth, who were respectable in debate, but very inferior to the occupiers of the opposition bench, Lord Chatham, Lord Rockingham, Lord Camden, and Lord Shelburne. On the one side the only hope held out was from determination, vigor, and severity; while the other clung to gentleness, confidence, and conciliation,—without as yet for a moment admitting the possibility that the mother-country could be reduced to the necessity of renouncing her sovereignty over her transatlantic colonies.

The first occasion when Lord Mansfield appeared as leader in this memorable struggle was upon the motion to agree to a joint address of both Houses to the King, “lamenting [FEB. 7, 1775.] the disturbances which had broken out in the province of Massachusetts, beseeching his Majesty to take the most effectual measures for enforcing due obedience to the laws and the authority of the supreme legislature, and assuring him of their resolution to stand by him at the hazard of their lives and fortunes.”<sup>1</sup> The House of Lords having got into sad confusion, and the Government being in danger of discomfiture from the imbecility of the Lord Chancellor, the Chief Justice rose from a back bench and made a very long and able speech, a few passages of which still possess interest:—

“My Lords,—We are reduced to the alternative of adopting coercive measures or at once submitting to a dismemberment of the empire. Consider the question in ever so many lights, every middle way will speedily lead you to either of these extremities. The supremacy of the British legislature must be complete, entire, and unconditional; or, on the other hand, the colonies must be free and independent. The claim of *non-taxation* is a renunciation of your authority. If the doctrine be just, it extends to the right of separating from you and establishing a new republic. It is to the last degree monstrous and absurd to allow that the colonists are entitled to legislate for themselves on one subject and not on all. If they have any such privilege, the defence of it would justify resistance; and I have not yet heard any noble lord say that their resistance would not be rebellion.”<sup>2</sup> . . . “I admit the impolicy of the taxes imposed in 1767, which have been the cause of the troubles and confusion which we now deplore. They irritated the colonists, cramped our own commerce, and encouraged smuggling, for the benefit of our commercial rivals.<sup>3</sup> But the course was to petition for their repeal, and not to treat them as illegal. Concession now is an abdication of sovereignty. All classes will feel severely the effects of war, and no one can answer for its events. The British forces may be defeated; the Americans may ultimately triumph. But are you prepared to surrender without striking a blow? The question being whether the right of the mother-

<sup>1</sup> 18 Parl. Hist. 223.

<sup>2</sup> However, in answer to Dr. Johnson’s “Taxation no Tyranny,” there came out soon after a pamphlet entitled “Resistance no Rebellion.”

<sup>3</sup> This was a skilful shot, for Lord Camden was then Chancellor, and Lord Chatham held the Privy Seal, and was nominally prime minister, although secluded from public business.

country shall be resolutely asserted or basely relinquished, I trust there can be no doubt that your Lordships are prepared firmly to discharge your duty, convinced that the proper season for clemency is when your efforts have been crowned with victory."

Lord Camden unconstitutionally and pusillanimously disclaimed having had any concern in the measure of taxing America adopted by the administration to which he belonged, saying that "he was never consulted about it, and that he was at the time closely and laboriously employed in discharging the weighty functions of his office."

*Duke of Grafton*: "My Lords, it is mean, and much beneath the dignity of one who acted in the exalted station of the noble and learned Lord to try to screen himself from the disagreeable consequences of the measure now deplored, and to shift the blame from his own shoulders on those of others who, he knows, were no more the authors of it than himself. The measure was consented to in the Cabinet; the noble and learned Lord sat on that woolsack while it passed through this House in all its stages. He was the very person who officially notified the royal assent to it, and is he now to tell the House that it passed without his approbation or participation? With respect to the other noble and learned Lord, I must regret that the administration with which I was connected was the only one which, for a long course of years, had not the benefit of his assistance. Other administrations, no doubt, profited much by his experience and ability; and, if he had continued to attend the Cabinet, I am sure his advice would always have been respectfully heard; although, from doubts as to its being constitutional and expedient, it might not always have been followed."

*Lord Mansfield*: "I feel this to be a direct attack upon me for improperly mixing in politics, and I must exculpate myself from the charge. I was a privy councillor during a part of the last reign, and I have been during the whole of the present. But there is a nominal council, and there is an efficient council called the CABINET. For several years I acted as a member of the latter; and, consequently, deliberated with the King's minister. However, a short time previous to the administration in which the noble Marquis opposite [Rockingham] presided, and some considerable time before the noble Lord succeeded him in that department, I prayed his Majesty to excuse my further attendance; and, from that day to the present, I have declined to act as a member of the Cabinet. I have lived with every administration on equally good terms; I have never refused my advice when applied to: the noble Marquis must recollect several occasions when I gave him the best assistance my poor abilities were capable of. I was equally ready to assist the noble Duke; and, if he had asked my opinion upon the taxes which, by his instrumentality, were imposed upon America, I should certainly have pronounced them impolitic. I opposed the repeal of the Stamp Act from a sense of public duty; but I took no other part in opposing the Government, and I even returned a hostile proxy that I might not appear to be encouraging others to obstruct its measures. I have never interfered



unless for the good of my country, and no profit or emolument has ever accrued to me from being the member of any Cabinet."

*Lord Shelburne*: "The noble and learned Lord who has just sat down endeavors to strengthen his bare assertion that he has never improperly interfered, by showing what little or no temptation he could have to interfere; but the noble and learned Lord knows—every noble Lord in this House knows—a court has many allurements besides profit and emolument. He denies any obligations or personal favors whatever: but he will permit me to observe that smiles may do a great deal; that, if he had nothing to ask for himself, he had friends, relations, and dependents, who have been amply provided for—I will not say beyond their deserts, but this I may say, much beyond their most sanguine expectations. Independent, however, of these considerations, I think the pride of directing the councils of a great nation to certain favorite purposes, and according to certain preconceived principles, may tempt to great hazards, and to interferences which, upon an impeachment, it would be hard to justify. Measures of high importance being disclaimed by the ostensible ministers who proposed them, we cannot tell by whom we are ruled, and we cannot be said to live under responsible government. Several bills of the last session for coercing our American brethren having been disavowed by the officers of the Crown who ought to have prepared them, it is natural for the public to look to a great law Lord, notoriously high in the confidence of the present Cabinet (if not a member of it), with whose doctrines the harsh enactments of these bills so exactly agree."

*Lord Mansfield* (rising in a great passion): "I thought, my Lords, it had been the leading characteristic of the members of this assembly, contrasted with those of another who too often descend to altercations and personal reflections, always to conduct themselves like gentlemen; but I see that rule departed from this evening for the first time. I charge the noble Lord who last addressed the House with uttering the most gross falsehoods. I totally deny that I had any hand in preparing *all* the bills of the last session,<sup>1</sup> and I am certain that the law officers of the Crown never asserted that they had no hand in them. But whether they had or had not is of no consequence to me, for I am sure the charge applied to me is as unjust as it is maliciously and indecently urged."

According to the *PARLIAMENTARY HISTORY*, "Lord Shelburne returned the charge of falsehood to Lord Mansfield in direct terms."<sup>2</sup> This scene makes the conflicts approaching to [A. D. 1775.] personality which in our days sometimes take place, between law lords and other members of the House, appear almost courteous and orderly. I do not find that there was any apology, or that any of the parties were ordered into the custody of the Black Rod to prevent a breach of the

<sup>1</sup> *Sic* in the *Parliamentary History* (vol. xviii., p. 282), but he can hardly have used such language. This would be, what he himself, in the Court of King's Bench, would have called "a negative pregnant," *i. e.* a negative pregnant with an affirmative,—admitting that he prepared the bills *de quibus agitur*.

<sup>2</sup> Vol. xviii. p. 283.

peace. The House divided at two in the morning,—when the address was carried by a majority of 104 to 29,—and the following day passed over without any news of the ex-Chancellor or the Lord Chief Justice of the King's Bench having fought a duel in Hyde Park.<sup>1</sup>

The combat was speedily renewed in the House of Lords. America was the subject of almost daily discussion; and, till the vigorous Thurlow was substituted as Chancellor for the feeble Bathurst, the efficient defence of the measures of the Government rested mainly on Lord Mansfield. He was not formally a member of the Cabinet, but Lord North was in frequent communication with him; he had audiences of the King, and he was substantially a minister.

He strongly urged (and so far he was right) that if there was to be a [DEC. 20.] civil war it ought to be carried on by England with more vigor. When the bill to prohibit all intercourse with certain of the American states was debated, he thus answered the argument that the measure would produce great distress:—

“Yet, my Lords, admitting all this to be true, what are we to do? Are we to rest inactive, with our arms folded, till they shall think proper to begin the attack, and gain strength to act against us with effect? We are in such a situation that we must either fight or be pursued. What a Swedish general in the reign of Gustavus Adolphus said to his men, just on the eve of battle, is extremely applicable to us at present. Pointing to the enemy, who were marching down to engage him, said he, ‘My lads, you see those fellows yonder; if you do not kill them, they will kill you.’ My Lords, if we do not get the better of America, America will get the better of us. We do not fear that they will attack us at home; but consider what will be the fate of our sugar islands? what will be the fate of our trade?”

He goes on at great length to argue that if the insurgents obtained [A. D. 1775–1776.] independence they would speedily wrest from us all our possessions in the West Indies, as well as on the continent of America, and that we should be utterly ruined by their great commercial prosperity: the doctrine still being entertained,—even by intelligent men, who never thought of reciprocity, or believed that goods exported or imported are paid for otherwise than by the precious metals,—that there is a limited and invariable aggregate of commerce in the world; and that in proportion as any nation has a large share of it, less is left for others.<sup>2</sup>

The town was for a time relieved from such discussions by the trial of the Duchess of Kingston for bigamy, which was regarded as an amusing farce. Lord Mansfield seeing the nature of this exhibition, and aware how it must terminate, ineffectually attempted to mitigate the disgrace it must bring upon the administration of justice, by moving that—instead of Westminster Hall being fitted up for the occasion as if a sovereign were to be called to account for subverting the liberties of his people, or the governor of a distant empire become dependent on the Crown of England were impeached for oppression and misrule,—the amorous

<sup>1</sup> 18 Parl. Hist. 221—298.

<sup>2</sup> 18 Parl. Hist. 1102.

intrigues of this lady of fashion should be investigated in the small chamber in which the Peers then usually met. Several peers having urged that, from the dignity of the party accused, the more solemn mode of proceeding should be preferred, he said,—

“I do not conceive that the charge against the lady has anything sufficient to distinguish it from many others tried at your Lordships’ bar. In 1725 I was present myself when Lord Macclesfield was tried for a grievous offence at this bar; an offence, considering the office he then held, that of Chancellor of Great Britain, accompanied by several aggravating circumstances, for which he might have incurred a fine that would have affected perhaps the whole of his fortune, and, consequently, have ruined his family. The proceedings were by impeachment,—the most solemn mode of preferring an accusation known under our laws. The prosecution was not carried on by counsel, as this will be, but by managers of the House of Commons, many in number. All accusations by bill of attainder are carried on at this bar, and Lord Strafford lost his head on the event of a trial so conducted, the place of trial not being considered one of the hardships he had to encounter.<sup>1</sup> If, then, trials affecting the life, fortune, and honors of a peer of the realm have proceeded in the chamber of parliament, will your Lordships think that greater solemnity is due to a trial where conviction can lead to no punishment?—for I must remind your Lordships that this is a clergiable offence, for which a peeress can only be admonished ‘to sin no more, lest a worse thing befall her.’ If she is brought to trial in Westminster Hall, the eyes of Great Britain and of all Europe will impatiently wait for the issue; and what will be thought when a verdict of GUILTY produces nothing but an admonition and a curtesy.”

However, the Peers would have the spectacle, and it terminated exactly as was here foretold.<sup>2</sup>

Lord Mansfield, for his judicial services, deserved the highest distinctions that could be bestowed on him; and by the part he took against the Americans he was specially endeared to George III., who entered into the contest and persevered in it with much more eagerness than any of his ministers. As a mark of royal favor, the Chief Justice had some time before this been created a Knight of the Thistle; and now he was raised to a higher dignity in the peerage, with a limitation [OCTOBER.] to preserve the title although he had no children, and to make it take precedence of the hereditary honors of his house. He was made Earl of Mansfield, of Mansfield in the county of Nottingham, with remainder to Louisa Viscountess Stormont and her heirs, by Viscount Stormont, the nephew of the new Earl. The lady was thus introduced because it had been erroneously decided that a British peerage could not be conferred upon a Scotch [A. D. 1792.] peer although he might inherit it from his mother. When this absurdity was, some years afterwards, corrected by a contrary decision, a new

<sup>1</sup> Lord Strafford’s trial on the impeachment was in Westminster Hall, although it was on the bill of attainder that he suffered.—3 St. Tr. 1413.

<sup>2</sup> 18 Parl. Hist. 1112; 20 St. Tr. 355—651.

patent was granted to Lord Mansfield, in which he was designated Earl of Mansfield, of Caen Wood, in the county of Middlesex, with remainder to Viscount Stormont and his heirs. Thus two Earldoms of Mansfield [A. D. 1776.] were constituted—the latter of which, on the death of the first grantee, descended upon Viscount Stormont,—while the former was taken by the Viscountess, and enjoyed by her in her own right many years after her husband's death.

On his first promotion in the peerage, the Earl of Mansfield received this congratulatory epistle from his old schoolfellow, Bishop Newton:—

“Kew Green, Oct. 20th, 1776.

“My Lord,—You have long merited the highest honors which this country can bestow; but it was not fitting that they should die with you: something should remain as a monument to posterity. I beg leave, therefore, to congratulate your Lordship, or rather my Lord Stormont, upon your additional titles. Nothing can be properly an addition to yourself. You may rank higher in the world, but you cannot rise higher in the opinion and esteem of all who know you, and particularly of,

“My dear Lord,

“Your Lordship's ever affectionate and obedient servant,

“J. BRIST.”

The following answer was returned, disclosing the private feelings of the writer on this occasion, and presenting him in rather an amiable point of view:—

“Kenwood, Oct. 22, 1776.

“My dear Lord,—I am exceedingly flattered by your letter, which I have just received; because I know the friendly sincerity of the heart from whence it flows. You do justice to my view in this creation. Lady Stormont is five months gone with child. If it please God to bless Lord Stormont with issue male, I wish from a pardonable vanity because common, that they may represent my name as their first title. The manner of conferring this mark did great honor, and consequently gave great pleasure, to

“Your most affectionate, &c.

“MANSFIELD.”

But we must now return to graver matters. Hostilities with America ere long began; and, notwithstanding frequent appeals to the principles of freedom from Lord Chatham, Lord Camden, and the opposition leaders in the House of Commons, there can be no doubt that the war in its origin was popular, and that the vast majority of Englishmen approved of Lord Mansfield's exhortations to crush rebellion and to preserve British ascendancy. His sentiments harmonised even with those of the city of London, where Wilkes had fallen into contempt.

[JULY 4, 1777.] Therefore, when called upon to try Horne Tooke for a libel in taking part with the Americans, he felt none of the misgivings and apprehensions which had overwhelmed him on the trials of the printers of JUNIUS. The demagogue who now struggled to bring the Government into odium,—notwithstanding his great acuteness and power of sarcasm,—was not very successful in gaining public



sympathy,—so that he was never able to rival Wilkes as the representative of a popular constituency,—and never had even a taste of parliament till, very late in life, he became the nominee of the capricious owner of a rotten borough, who hesitated some time between him and a negro.

The charge against him was for writing and publishing an advertisement, proposing a subscription “to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King’s troops at Lexington and Concord, in the province of Massachusetts.” He conducted his defence in person against Mr. Attorney General Thurlow. His great object seems to have been to provoke Lord Mansfield to a sally of impatience, of which he might have taken advantage; and he even cross-examined some printers of newspapers respecting their having been “solicited not to insert any observations upon a late legal Earldom:” but he was completely foiled, for the Chief Justice remained throughout calm and placid, and always felicitously seizing the right moment for the exercise of authority, gained an unsullied triumph. In summing up to the jury, he not only left to them his usual questions as to publication and the *innuendoes*, but, confident in their *anti-Yankee* feelings, he asked their opinion on the criminality of the alleged libel, saying,—

“Read! You will form the conclusion yourselves: ‘Our beloved American fellow-subjects,’—in rebellion against the state! They are our fellow-subjects, but not so absolutely beloved without exception! ‘Beloved’ to many purposes; beloved to be reclaimed; beloved to be forgiven; beloved to have good done to them; but not beloved to be abetted in their rebellion! The information charges the libel to relate to the King’s government and the employment of his troops. Read it, and see whether it does relate to them. If it does, what is the employment they are ordered upon? The paper says, ‘to murder innocent subjects, because they act like Englishmen and prefer liberty to slavery!’ Why, then, what are they who gave the orders? What are they who execute them? Draw the conclusion. Read this paper, and judge for yourselves. You will consider whether it conveys a harmless innocent proposition for the good and welfare of this kingdom, the support of the legislative government and the King’s authority according to law? Is the contest to reduce innocent subjects to slavery? and were those who fell fighting against the King’s troops at Lexington really *murdered* (as you have been told) like the unhappy victims who were massacred in their beds at Glenco?”

The jury, after a short deliberation, found a verdict of *Guilty*; and the defendant was sentenced to a year’s imprisonment, and to pay a fine of 200*l*.<sup>1</sup>

But the hope of speedily crushing the Americans, which had animated Lord Mansfield, and had induced the great bulk of the nation warmly to support the policy of the Government, was cruelly disappointed. Every fresh arrival showed the aspect of affairs beyond the

<sup>1</sup> 20 St. Tr. 651—802.

Atlantic to be more and more alarming, and in the course of a few months came the stunning intelligence that General Burgoyne and his army had capitulated at Saratoga. The poignancy of Lord Mansfield's grief at seeing all his predictions falsified, and being reproached as one of the principal authors of the measures which had proved so disastrous, [FEB. 1778.] was greatly aggravated by the attempt to form a new administration, at the head of which was to be placed the man whom he most dreaded and most hated. His own office was secure, with all its great emoluments: but he was to lose power, which, notwithstanding his assertions and perhaps his belief to the contrary, he fondly cherished; and he must either go into opposition, which was uncongenial to his nature, or become the humble supporter of an imperious rival. He was relieved from these apprehensions by the failure of the negotiation with Lord Chatham which had been entered into when France showed a determination to take part with the Americans; and he continued vigorously to support Lord North against all the proposals which were pressed upon him for renouncing our supremacy over the colonies, or for making concessions to them with a view to conciliation. Lord Chatham, who recommended the latter course, still scorning the notion of American independence, seemed to become more formidable in intellect as his bodily faculties decayed; and, during his declamation against the employment of savages with scalping-knives in carrying on the war, Lord Mansfield silently quailed under him, afraid of being blasted by the lightning of his wrath, while he spoke those scornful words:—"I do not call for vengeance on the heads of those who have been guilty; I only recommend retreat: let them walk off, and let them make haste, or speedy and condign punishment will overtake them."

It was indispensably necessary to meet such attacks with firmness, or to perish by them; and when Lord Chatham announced his intention, notwithstanding severe illness, to be present on the Duke of Richmond's motion in the committee on the state of the nation, it was resolved that the friends of Government should answer him,—and Lord Mansfield, remembering conflicts with his great rival in which he himself had the advantage, felt his courage revive.

Fate had ordained that they should never have another conflict. The [APRIL 7.] appointed day arrived. Lord Chatham appeared, and spoke some time with all his ancient fervor; but he perished in the effort. When, in the garb of sickness, he was led into the House between his son and son-in-law, Lord Mansfield joined in the voluntary tribute of respect paid to him by standing up while he passed to his proper place. Having risen slowly and with difficulty to address the House, supported under each arm by his relatives, the dying patriot took one hand from his crutch, and, raising it, and casting his eyes towards heaven, he thus began:—"I thank God that I have been enabled to come here this day to perform my duty, and to speak on a subject which has so deeply impressed my mind. I am old and infirm—have one foot, more than one foot, in the grave;—I am risen from my bed to stand up in the cause of my country—perhaps never again to speak in this

House." Most who heard him were softened with pity, as well as struck with awe; but Lord Mansfield appeared to be thinking only of the topics which were likely to be urged by the assailant, and the best arguments to be used in answering him. The exertion of the orator proving too mighty for his enfeebled frame, he sank in a swoon, and the House was thrown into alarm and agitation,—but Lord Mansfield so conducted himself as entirely to escape the charge of affected sorrow.

We have the most authentic account of what then passed in a letter written immediately after to the Duke of Grafton, who was absent, by Lord Camden, who had been sitting by the side of Lord Chatham, and who thus describes the catastrophe:—

"He fell back upon his seat, and was to all appearance in the agonies of death. This threw the whole House into confusion; every person was upon his legs in a moment hurrying from one place to another, some sending for assistance, others producing salts, and others reviving spirits. Many crowding about the Earl to observe his countenance, all affected, most part really concerned; and even those who might have felt a secret pleasure at the accident, yet put on the appearance of distress, except only the Earl of M., who sat still, almost as much unmoved as the senseless body itself."<sup>1</sup>

An attempt has been made by a warm admirer and most eloquent eulogist of Lord Mansfield to rescue him from the charge of this supposed *nonchalance*, and fix it upon another:—"The Earl of M.," says Lord Brougham, "so discreditably mentioned in this letter, must have been Lord Marchmont. In the Lords' Journals for that day, April 7, 1778, he and Lord Mansfield are the only Earls of M. present; and Lord Mansfield was wholly incapable of suffering such feelings to be seen on such an occasion."<sup>2</sup>

The Earl of Marchmont was present on this occasion, but I know not why insensibility should be imputed to him more than to his distinguished countryman; and it is quite certain that *his* demeanor would have excited no attention,—that all mankind must have been anxious to observe the impression made by the death-blow of Chatham on an old rival,—and that Lord Camden, writing to the Duke of Grafton, by "the Earl of M.," could mean no other than the Earl of Mansfield, whom they both knew so familiarly. Besides, I am not sure that the imputation, though maliciously meant, ought seriously to lower the object of it in our esteem, for it is not pretended that he betrayed any satisfaction: and, instead of idly proffering assistance, or hypocritically beating his bosom, he might have been thinking with some tenderness of their first meeting as students at Oxford, or calmly considering how soon his own earthly career must be concluded.

It cannot be denied, however, that he acted an ungenerous part in the proceedings which were proposed to do honor to the memory of the deceased, and to mark the public gratitude for his services in advancing the glory and prosperity of the country. Upon an address of the House

<sup>1</sup> See 19 Parl. Hist. 1012—1058.

<sup>2</sup> Law Review, vol. ii. p. 316.

of Commons, the King having given directions that the remains of the great patriot should be deposited in Westminster Abbey, Lord Shelburne gave notice of a motion in the House of Lords, that their Lordships should all attend the funeral. Although there was a strong canvas, Lord Mansfield could not make up his mind to vote either for it or against it. He pusillanimously absented himself; and, upon a division, the motion was negatived by a majority of one.<sup>1</sup>

If he thought that the Peers, in their aggregate capacity, should not pay such homage to an individual from whose opinions they had generally differed, he might, without suspicion of political inconsistency, have attended the solemnity as a private person, to show his respect for the splendid talents and acknowledged virtues of him whom he had known intimately when a boy, and with whom he had been engaged in a competition for honorable distinction above half a century. But while the Court could not resist the general impulse in favor of a public funeral, all true courtiers endeavored to diminish the effect of it; and Lord Mansfield's name is not to be found in the list of those who saw consigned to the tomb the dust of the greatest orator and statesman England had produced for ages.<sup>2</sup>

An opportunity soon occurred to him for relieving himself from the uneasy feelings which must have annoyed him when he reflected on his paltry conduct. The bill for annexing an annuity of 4000*l.* a-year to Lord Chatham's title, which had passed the House of Commons almost unanimously, was strongly opposed in the House of Lords; and the Lord Chancellor, and other members of the party called the "King's Friends," not only objected to it on the score of economy, but made violent attacks on the career and character of the deceased Earl,—even depreciating his talents.<sup>3</sup> Lord Mansfield was present, but remained silent.<sup>4</sup> I am afraid it is impossible to doubt that on this and other occasions he displayed a want of heart, as well as of moral courage.—But we must not hate or despise him for these infirmities: if, to the

<sup>1</sup> Lords' Journals, 19 Parl. Hist. 1233.

<sup>2</sup> "Lord Chatham's funeral was meanly attended, and Government ingeniously contrived to secure the double odium of suffering the thing to be done and of doing it with an ill grace." (*Gibbon's Misc. Works*, vol. i. p. 538.) The Annual Register for 1778, however, says that "the funeral was attended by a great number of lords, mostly in the minority."

<sup>3</sup> Thurlow, in his coarse bantering manner, concluded with a parody upon the stanza in Chevy Chase respecting the death of Percy:—

"Now God be with him," said our King,  
 "Sith 'twill no better be,  
 I trust I have within my realm  
 Five hundred good as he."

<sup>4</sup> On a division, the numbers were, for the bill 42, against it 11. I have not been able to find out with certainty how Lord Mansfield voted. There was a protest setting forth that "this may in after times be made use of as a precedent for factious purposes, and to the enriching of private families at the public expense;" but this was not signed by Lord Mansfield, and only by one prelate and three temporal peers.—19 Parl. Hist. 1233—1255.



great qualities which he actually possessed, he had added the boldness of Chatham and the friendly enthusiasm of Camden, he would have been too perfect for human nature.

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## CHAPTER XXXVIII.

### CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL THE CONCLUSION OF THE TRIAL OF LORD GEORGE GORDON.

LORD MANSFIELD and his friends expected that after the death of Chatham he would have an unbounded ascendancy in the House of Lords; but it is an undoubted fact that from this time his political importance greatly declined. He was not so much wanted as the champion of the Government, and the stimulus which had excited him to his finest parliamentary displays was gone. Thurlow, firmly seated on the woolsack, proved himself a match in debate for any member of Opposition; and he gallantly defended all ministerial measures till the nation, universally become sick of the war which they had once so much approved, forced Lord North to resign, that a negotiation might be opened with our revolted colonies as an independent state.

I find only one speech of Lord Mansfield upon the American question after Lord Chatham's death; and, strange to say, in this he recommends a coalition between the parties into which the state was then divided: but we must recollect that he no longer dreaded seeing in council him whom he and the King so mortally hated, and that there was no chance of the Government being able to carry on the war without some great accession to its strength. At the meeting of parliament in [Nov. 25, 1779.] November, 1779, the Marquis of Rockingham, in opposing the address, moved an amendment, which after drawing a contrast between the happy state of affairs at the accession of his Majesty and the lamentable one to which the nation was reduced, represented to his Majesty "if any thing could prevent the consummation of public ruin, it could only be new councils and new counsellors." Lord Mansfield took a review of the different administrations which had succeeded each other during the present reign; showing that each of them was as much answerable for the disasters now deplored as the present administration, in whose time they had actually occurred:—

"The tax on tea," said he, "sowed the seeds of the present rebellion; and that was imposed by the noble Duke in the blue ribbon, who now complains so bitterly of the measures of the Government. I will give no opinion at present whether it was a wise tax or not; but it was sanctioned by the noble and learned Lord [Lord Camden] who has denounced with such bitterness all who have advised the Crown since he resigned: and a noble Earl, who may now be considered the most active leader of Opposition then had a seat in his Majesty's councils, and never openly objected

to it. To suppose that he privately condemned, and yet appeared in parliament to support it, is an imputation that I would not throw upon him or upon any member of this assembly. The present Ministers neither passed the Stamp Act nor repealed it, nor imposed the tea duty nor induced the Americans to resist it. Why should they only be punished when the crime is common? and why should they be punished by the true authors of the misfortunes laid to their charge? But, my Lords, let us rather consider how the nation can be rescued from the perils which surround it. I say that nothing but a full and comprehensive union of all parties can effect its salvation. I am old enough to remember the country in very embarrassed situations—none, I acknowledge like the present. I have seen violent party struggles—none so violent as the present. Nevertheless, I by no means despair.” Having alluded to the arrangement made on the retirement of Sir Robert Walpole, and the formation of Lord Chatham’s first administration, he continued:—“I had a hand in that negotiation, and what was the consequence? Two persons only, after some fluctuation, were taken in; yet by so immaterial a change the nation was satisfied, a coalition ensued, and the effect of that seasonable union was the immense accession of territory made in the course of the late glorious war. How far the temper of the nation or the state of parties may admit of a coalition at present, I will not pretend to determine; but, my Lords, it is an event most earnestly to be desired, for the country requires the assistance of every heart and hand; and with such co-operation, although I am far from desponding, I shall still anxiously await, the event. My resolution is firm, but my confidence staggers.”

Still the Government was strong in point of numbers, and the amendment was negatived by a majority of 82 to 41.<sup>1</sup>

I now approach scenes which are most discreditable to the English nation, but in which Lord Mansfield appears to the highest [A. D. 1780.] advantage. To explain why he was the special object of the fury of the fanatical mob headed by Lord George Gordon and for several days in possession of the capital, I must go back to some of his decisions on questions connected with religion. He was actuated by the enlightened principles of toleration; and, although a sincere friend to the Church of England, he steadily protected, by the shield of the law, both Dissenters and Roman Catholics from the assaults of bigots who wished to oppress them.

Lord Mansfield was the first judge who extended the prerogative writ of *mandamus* to enforce the admission of a dissenting minister to an endowed chapel: saying,—

“The right itself being recent, there can be no direct ancient precedent; but every case of a lecturer, preacher, schoolmaster, curate, or chaplain, is in point. Here is a *function* with emoluments and no specific legal remedy. The right depends upon election, which interests all the voters. The subject is of a nature to inflame men’s passions. Should the Court deny this remedy, the congregation may be tempted to

<sup>1</sup> 20 Parl. Hist. 1020—1022.

resort to force. A dispute as to who shall preach Christian charity, may well raise implacable feuds and animosities, in breach of the public peace, to the reproach of government and the scandal of religion. Were we to deny the writ, we should put Presbyterian Dissenters and their religious worship out of the protection of the law.”<sup>1</sup>

The question having arisen whether, in an action to recover penalties for bribery, a Quaker could be admitted as a witness on his affirmation without taking an oath, Lord Mansfield said,—

“This question is of great importance to all the Quakers in the kingdom, and to the general administration of justice. I wish the affirmation of a Quaker had been put on the same footing as an oath in all cases whatsoever; and I see no reason against it, for the punishment of the breach of it is the same. Upon general principles I think the affirmation of a Quaker ought to be admitted in all cases, as well as the oath of a Jew or a Gentoo, or of any other person who thinks himself really bound by the mode and form in which he attests. But even the limited indulgence which they enjoy was obtained with much difficulty and after a long struggle. The legislature formerly looked upon Nonconformists as criminals; and Quakers, in particular, as obstinate offenders. This only served to increase their number. If they had been let alone, perhaps they would not have come down to these times. The more generous and liberal notions of the present age do not look upon real scruples in the light of an offence. However Quakers are still excluded from giving evidence in ‘criminal causes,’<sup>2</sup> and we are to say what was the meaning of the legislature by this exclusion. Although it may not be possible to give any good reason for the exception, it was made and it must be followed. But, being a hard positive law, it is not to be extended by construction. Now, although bribery is a crime, this action to recover penalties for bribery is a civil cause, as much as an action for money had and received. The exception must be confined to cases technically criminal. A different construction would not only be injurious to Quakers, but prejudicial to the rest of the King’s subjects who may want their testimony.”<sup>3</sup>

A still nobler opportunity was afforded to Lord Mansfield of showing his liberality in matters of religion, when the corporation of the city of London, wishing at once to swell their revenues and to punish Dissenters, passed a bye-law inflicting a heavy pecuniary mulct upon freemen who, being elected, should not serve the office of sheriff; and then elected a dissenter, who they knew would not serve, as he could not take the sacrament according to the rites of the Church of England. This gentleman, being sued for the penalty, pleaded, by way of defence, that “he was a Dissenter, and therefore was incapable of serving.” This plea

<sup>1</sup> 3 Burr. 1269; Holl. 263; *Rex v. Barker*.

<sup>2</sup> 7 & 8 W. III. c. 34.

<sup>3</sup> *Atcheson v. Everett*, Cowp. 382. The exception, so modified, continued in force above half a century longer; but if a man is now falsely accused of murder, he may escape the gallows by calling a Quaker to prove his innocence. See 9 Geo. IV. c. 32; 3 & 4 W. IV. c. 49.

was overruled in the court in which the action was commenced, but the case ultimately came by appeal before the House of Lords. Fortunately we have an authentic account of Lord Mansfield's judgment, recommending a reversal. It was taken down by Dr. Philip Faraceaux, a famous Presbyterian divine, who was present when it was delivered, and his report of it was afterwards revised by Lord Mansfield. Although of great length, the whole of it may be perused with delight, but I can only afford to introduce a few extracts from it :—

“There is no usage or custom independent of positive law which makes *Nonconformity* a crime. The eternal principles of natural religion are part of the common law ; the essential principles of revealed religion are part of the common law ;—so that any person reviling, subverting, or ridiculing them, may be prosecuted at common law.<sup>1</sup> But it cannot be shown from the principles of natural or revealed religion that, independent of positive law, temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship. Prosecution for a sincere, though erroneous, conscience is not to be deduced from reason or the fitness of things. . . . Conscience is not controllable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites or martyrs.

“My Lords, there never was a single instance, from the Saxon times down to our own, in which a man was punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no persecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law ; but here nonconformity is no sin by the common law ; and all positive laws, inflicting any pains or penalties for nonconformity to the established rites or modes, are repealed by the Act of Toleration, and Dissenters are thereby exempted from all ecclesiastical censures. What bloodshed and confusion have been occasioned from the reign of Henry IV., when the first penal statutes were enacted, down to the revolution in this kingdom, by laws made to force conscience ! There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy. Sad experience and a large mind taught that great man, the President De Thou, this doctrine. Let any man read the many admirable things which, though a papist, he hath dared to advance on this subject, in the dedication of his history to Henry IV. of France (which I never read without rapture), and he will be fully convinced, not only how cruel but how impolitic it is to prosecute for religious opinions. There was no occasion to revoke the edict of Nantes ; the Jesuits needed only to have advised a plan

<sup>1</sup> This, I think, is the true sense of the often-repeated maxim, that “Christianity is part and parcel of the common law of England.”



similar to that which is contended for in the present case: make a law to render them incapable of office; make another to punish them for not serving. If they accept, punish them (for it is admitted on all hands, that the defendant, in the cause before your Lordships, is prosecutable for taking the office upon him)—If they accept, punish them; if they refuse, punish them: if they say yes, punish them; if they say no, punish them. My Lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of;—it is as bad persecution as that of Procrustes: if they are too short, stretch them; if they are too long, lop them.”

This noble vindication of the rights of conscience produced an unanimous reversal of the decree of the Lord Mayor's Court, but caused considerable clamor in the City; and Lord Mansfield was set down with many as “little better than an infidel.”

What completed his bad name, was his direction to the jury in an action brought against a person, alleged to be a Roman Catholic priest, for celebrating mass, which, as the law then stood, subjected him, if found guilty, to a very severe penalty. I must confess that the effort made on this occasion to evade an obnoxious penal statute can hardly be justified, and that the better course would have been to allow it to be enforced, so that, its injustice being made manifest, it might more speedily be repealed. From the commentaries upon the evidence there can be little doubt that it was really sufficient to make out the case:—

*Lord Mansfield*: “There are here two questions for your consideration: 1st. Is the defendant a priest? 2d. Did he say mass? By the statute of Queen Elizabeth it is high treason for any man proved to be a Popish priest to breathe in this kingdom. By what was considered a mild enactment in the reign of William III., a Popish priest convicted of exercising his functions is subject to fine and perpetual imprisonment. But, first, he is to be proved to be a priest, for, unless he be a priest, he cannot be touched for the enormity of saying mass; and then, unless he be proved to have said mass, the crime of being a priest will escape with impunity. Now the only witness to the mass is Payne—a very illiterate man, who knows nothing of Latin, the language in which it is said: and, moreover, he, as informer, is witness in his own cause; for, upon conviction, he is entitled to 100% reward. Several others were called, but not one of them would venture to swear that he saw the defendant say mass. One swore that he sprinkled with holy water; another, that he addressed some prayers to the Virgin Mary in English; another, that he heard him preach, and, being asked what the sermon was about, observed that ‘it taught the people that good works were necessary to salvation—a doctrine which he looked upon as wholly at variance with the Protestant religion!’ Then, as to the defendant being a priest, you are not to infer that because he preached; for laymen often perform this office with us, and a deacon may preach in the Church of Rome. A deacon may be a cardinal,—if he may not be Pope. A deacon may even administer some of their sacraments, and perform many of their services; and we do not know that he may not elevate the Host—at least I do not know but he

may, and I am persuaded that you know nothing about it. If a deacon may perform all the ceremonies to which Payne swears, there is no evidence that the defendant is a priest. Why do they not call some one who was present at his ordination? You must not infer that he is a priest because he said mass, and that he said mass because he is a priest.<sup>1</sup> At the Reformation, they thought it in some measure necessary to pass these penal laws; for then the Pope had great power, and the Jesuits were then a very formidable body. Now the Pope has little power, and it seems to grow less every day. As for the Jesuits, they are now banished from almost every state in Europe. These penal laws were not meant to be enforced except at proper seasons, when there is a necessity for it; or, more properly speaking, they were not meant to be enforced at all, but were merely made *in terrorem*. Now, when you have considered all these things, you will say if the evidence satisfies you. Take notice, if you bring him in *guilty* the punishment is very severe; a dreadful punishment indeed! Nothing less than perpetual imprisonment!"<sup>2</sup>

The jury found a verdict of *Not Guilty*; but many zealous Protestants were much scandalized, and rumors were spread that the Chief Justice was not only a Jacobite but a Papist, and some even asserted that he was a Jesuit in disguise.

He continued, nevertheless, steadily to support the cause of religious liberty; and when the bill was brought forward to repeal so much of the act of William as condemns a Popish priest to fine and perpetual imprisonment for saying mass, and disqualifies a Papist to be the owner of land by inheritance or purchase, he expressed his entire approbation of it, although it passed with so little opposition, that there was no occasion for his taking any prominent part in supporting it.<sup>3</sup>

Measures which touch religious prejudices usually excite much clamor when first proposed, but when carried through are quietly acquiesced in. This Catholic Relief Bill, however, after having been quietly agreed to in Parliament, excited a violent ebullition of bigotry almost all over Great Britain. The public peace was first disturbed in Scotland, where intemperate resolutions and addresses were voted by the General Assembly of the Kirk, dangerous riots ensued, and several Roman Catholic places of worship were burnt to the ground.<sup>4</sup> Lord George Gordon was the

<sup>1</sup> This reminds me of the judge, who, much disliking the game laws, and trying an action against a man for using a gun to kill game without being qualified, when it had been proved that the defendant, being in a stubble field, with a pointer, fired his gun at a covey of partridges, and shot two of them, objected that there was no evidence that the gun was loaded with shot, and advised the jury to conclude that the birds fell down dead from the fright.

<sup>2</sup> Holl., p. 176-179.

<sup>3</sup> See 18 Geo. III. c. 61. Compare this with the trial of a Roman Catholic priest before Scroggs, *ante*, p. 11.

<sup>4</sup> The delusion of my countrymen on this occasion may be best understood from a proclamation by the lord provost and magistrates of Edinburgh, declaring that "to remove the fears and apprehensions which had distressed the minds of many well-meaning people in the metropolis, with regard to the repeal of the penal statutes against Papists, the public were informed that *the act of parliament passed*

organ in the House of Commons of the Scotch anti-popery party, and, in presenting their petitions against the recent concessions to the followers of Antichrist, described the people of Scotland as "ripe for insurrection and rebellion," and affirmed that "the inhabitants fit to bear arms, a few Papists excepted, were ready to resist the powers of the Government, and had invited him to be their leader." Finally, he declared that "the religious constitution of Scotland was sacred against any law the Parliament of Great Britain might enact for its alteration; that any such attempt was an actual breach of the fundamental conditions on which the union of the two kingdoms had been agreed to; and that the Scotch, being an independent nation when they entered into that treaty, henceforth resuming their ancient rights, would prefer death to slavery, and perish with arms in their hands or prevail in the contest."<sup>1</sup>

The south soon caught the fanatical flame. Protestant clubs were formed in London and in all the great towns in England; and, to oppose Popery with sufficient force, "The General Protestant Association" was formed, of which Lord George Gordon was chosen president. When Parliament again met, he not only inveighed against judges, but said, "The people were irritated and exasperated, being convinced that the King himself was a Papist;" and he averred that "if his Majesty did not keep his coronation oath, they would do more than abridge his revenue; they would cut off his head."

By the unchecked repetition of such ribaldry in debating societies, which were then the chief instruments of agitation, the populace were excited to a high pitch of frenzy, and were prepared for any violence. At last a "monster petition" to the House of Commons was got up against the spread of Popery; and it was resolved that "on Friday, the 2d of June, the whole body of the Protestant Association would assemble in St. George's Fields, with blue cockades in their hats, to distinguish real Protestants and friends of the petition from their enemies."

At the appointed time the petitioners, in blue cockades, mustered 60,000 strong, very near the place selected by the Chartists with similar views on the memorable 10th of April, 1848; and they intimated the same resolution, that "they would cross the Thames by one of the bridges, march in procession through the City, and present their petition with their own hands." They believed that the legislature would be overawed by their numbers, and they were determined to resist any attempt to control them. The Government, although fully aware of their intentions, forbade neither the meeting nor the procession,—neither stationed soldiers near the scene of apprehended danger, nor swore in special constables in aid of the parish beadle, who were then the only police in the metropolis,—nor took any step whatever for the preservation of the public tranquillity, more than if there had been an announcement of gambols in the streets by a band of morris-dancers. Accordingly the

*for that purpose was totally laid aside, and therefore it was expected that all peaceable subjects would carefully avoid connecting themselves with any tumultuous assembly for the future."*

<sup>1</sup> 20 Parl. Hist. 622.



procession, headed by Lord George Gordon, crossed London Bridge, marched through the City, and, before the usual hour for the assembling of the two Houses, had gained undisputed possession of Palace Yard and all the surrounding streets.

It is not for me to describe the scene in the House of Commons when the mob took possession of the lobby, amidst the cries of "No Popery!" My duty confines me to the outrages of which Lord Mansfield was the witness and the object. On account of the illness of Lord Chancellor Thurlow, he was this day to preside as Speaker of the House of Lords. In Parliament Street, being recognized by the mob, dreadful execrations were uttered against him as a notorious Papist, and the windows of his carriage were broken. By the vigor of his coachman he reached the door through which he was to ascend to his robing-room, and the messengers of the House afforded him some protection from the ruffians who threatened him. Nevertheless he was very ill treated, and when he came into the House he could not conceal his torn robe and his dishevelled wig. With calm dignity he took his place on the woolsack; for though deficient in *moral*, he was possessed of great *personal* courage.

Other peers who followed him fared much worse. Lords Hillsborough, Townshend, and Stormont, received many blows, and were in danger of their lives. The Archbishop of York had his lawn sleeves torn off and flung in his face. The Bishop of Lincoln, still more deeply suspected of popery, after his carriage had been broken to pieces, was carried in a fainting-fit into a private house in the neighborhood, from which he was obliged to fly in disguise over the roofs of the adjoining buildings. The Duke of Northumberland bringing along with him a gentleman habited in black the cry was raised that this was "a Jesuit employed by him as his confessor;" upon which he was forced out of his carriage, was robbed of his watch and purse, and had his clothes torn to pieces. Prayers were said; and the thanksgiving introduced at the time of the Gunpowder Plot, and still daily repeated, was once more applicable:—"We yield Thee praise and thanksgiving for our deliverance from those great and *apparent* dangers wherewith we were compassed in this place."

It happened, curiously enough, that the Lords were summoned to consider a bill of the Duke of Richmond for the Reform of Parliament by the introduction of annual parliaments and universal suffrage. At first they were resolved to play the part of Roman Senators, and, if they were to be massacred, to meet their end all sitting in their places and in the discharge of their senatorial functions. Accordingly, the order of the day being read, the Duke of Richmond rose, and descanted some time on the defects and abuses of our representative system, and the certain cure which he had to propose for them. But his hearers were thinking much more of their personal safety than of disfranchising Old Sarum or giving members to Manchester, for the yells of the mob in Palace Yard became every moment more furious. At last Lord Montfort, looking ghastly, covered all over with mud and hair-powder, burst into the assembly and began to vociferate. The Duke of Richmond complained of the interruption, and appealed to the woolsack for protection. Lord



Mansfield tried to restore order, but Lord Montfort insisted on being heard "in an affair of life and death, for Lord Boston coming to his duty as a peer of parliament, had been dragged out of his carriage by the mob, who would certainly murder him if he were not immediately rescued from their violence." "At this instant," says a contemporaneous account, "it is hardly possible to conceive a more grotesque appearance than the House exhibited. Some of their Lordships with their hair about their shoulders; others smothered with dirt; most of them as pale as the Ghost in Hamlet; and all of them standing up in their several places, and speaking at the same instant. One lord proposed to send for the guards, another for the justices or civil magistrates; many crying out 'Adjourn! adjourn!' while the skies resounded with the huzzas, shoutings, or hootings and hissings in Palace Yard. This scene of unprecedented alarm continued for about half an hour."<sup>1</sup>

Long after the time when it might have been expected that Lord Boston had met his fate, Lord Townsend offered to be one that would go in a body and attempt his rescue. The Duke of Richmond volunteered to be of the party, but said "if they went as a *house* the mace ought to be carried before the noble and learned Lord on the woolsack, who must go at their head." *Lord Mansfield*: "My Lords, I am ready to do all that your Lordships and my duty may require of me." The Duke of Gloucester disapproved of the Speaker and the mace going down, as, besides the possible danger to the person of the noble and learned Lord on the woolsack, the mob were so outrageous, that they would pay no more respect to the mace than to such of their Lordships as had been so dreadfully maltreated. At this moment Lord Boston made his appearance in the House, having sustained very little damage, for he had engaged some of the theological leaders of the mob in a controversy on the question "whether the Pope really be Antichrist?" and he had escaped merely with dishevelled hair and his clothes being covered over with hair-powder. He gave, however, a very formidable account of the increasing numbers and fury of the assailants.

After a long altercation between the opposition and ministerial Peers respecting the misconduct of the Government in taking no precautions to preserve the public peace, Lord Mansfield ordered the Black Rod to summon before them the High Bailiff of Westminster. This officer soon attended, and stated that "he had received no communication from the Secretary of State, but, attracted by the disturbance, he had done his utmost to restore tranquillity: as yet, he had only been able to collect six constables, who were waiting in the Guildhall till more could be fetched, as no good could be done with so small a force."

*Lord Mansfield*: "Perhaps you are not to be blamed for what has hitherto occurred; but I now command you, in the name of this House, to go round immediately to all justices of the peace in the city of Westminster, and in this division of the county of Middlesex, and instruct them to order all the King's loyal subjects of competent age to assist

<sup>1</sup> 21 Parl. Hist. 669.

in quelling this riot, that life may be preserved, and the law may be respected."

The Peers, however, were rather frightened than reassured; the Duke of Richmond abandoning his motion, they insisted on an immediate adjournment, and, with the exception of the noble and learned Lord on the woolsack, they all acted on the maxim of *sauve qui peut*. "The adjournment having taken place at nine o'clock," says the Parliamentary History, "the House gradually thinned, most of the Lords having either retired to the coffee-houses or gone off in hackney carriages, while others walked home under the favor of the dusk of the evening. But the most remarkable circumstance was, that Lord Mansfield, in the seventy-sixth year of his age, was left alone and unprotected, except by the officers of the House and his own servants."<sup>1</sup>

The art of *improvising* revolutions had not then been invented, or Lord George Gordon and his associates, this very evening, might have installed a provisional government, constituted a committee of public safety, and called an assembly of the people, to be returned only by true Protestants to re-enact and to aggravate all the laws against Papists. They had the metropolis entirely in their power, for the House of Commons had likewise pusillanimously resorted to the expedient of an *adjournment* to avoid the open disgrace of being overwhelmed by brute violence; and there was no more efficient protection for either branch of the legislature than the six constables in the Guildhall at Westminster. But, strange to say, when the "Associates" ascertained that both Houses had adjourned, content with their triumph, they marched off to other quarters of the town, and having amused themselves with burning down the chapels of the Sardinian and Bavarian ambassadors, in which the idolatrous sacrifice of the mass had been performed, they dispersed for the night. Thus Lord Mansfield, although seemingly abandoned to destruction by all his brother peers, after waiting about two hours in his private room, and drinking a cup of tea, drove home to his house in Bloomsbury Square as quietly as if, since time began, Parliament Street and the Strand had only listened to the drowsy notes of the watchman calling the hour and announcing a cloudy or a starlight night, nor had ever been startled by the cry of "NO POPERY!"

But this was only the lull of the tempest. Day after day the violence of the mob increased. Being still unchecked by civil or military authority, they altered their views, and Lord George Gordon having abdicated, he was replaced by more dangerous leaders. Many now joined the ranks of the insurgents who were indifferent about religion, and thought only of devastation and plunder. On Tuesday the 6th of June, the two Houses, anticipating the fate which befell the French Chamber of Deputies on the 24th of February, 1848, of being forcibly dispersed, adjourned for a fortnight, by which time it was hoped that order in the metropolis might be restored. But the fury of the insurgents

<sup>1</sup> Vol. xxi. p. 672. I observe with great pride that on this occasion the "Law Lord" showed much more courage than any other member of the House, spiritual or temporal.

was increased when all legitimate authority seemed to tremble before them. They likewise became more and more exasperated against Lord Mansfield, whose demerits as a friend to religious liberty were greatly aggravated in their eyes by rumors of the determination and firmness he had displayed on the evening when the riots first began.

Next day the insurrection was at its height. Newgate and the other prisons of the metropolis were stormed, and all their inmates set at liberty; the Inns of Court were besieged; preparations were made for attacking the Bank of England; distilleries belonging to Roman Catholics were set on fire; and the kennels ran gin, by which thousands in the streets were degraded into a state of beastly intoxication. Some bodies of soldiers were shown to the rioters to irritate them without doing any thing to check their excesses,—and, after this ill-judged activity, the Government seemed completely paralyzed. Still the great object of vengeance was Lord Mansfield,—the fanatics abhorring him for his sentiments in favor of religious toleration, and the thieves regarding him with apprehension as the president of the first criminal court in the kingdom. They did not intimate any intention of violence to his person, but they now openly declared that, before morning, they would burn his house in Bloomsbury Square, and all the property it contained. He had continued to reside there with his family, unaware of his danger.—According to the example of his predecessors, the Grand Justiciars and former Chief Justices, down to the time of Lord Holt, he ought, as supreme conservator of the peace, to have called forth the civil power, and, marching in person at the head of his levies, have taken the necessary steps for quelling the insurrection; but, ever after the accession of the House of Hanover, such functions were left entirely to the executive government, and he had not in any way interfered since the night of the assault upon the House of Lords. Afterwards he used to say “that perhaps some blame might have attached upon himself as well as on others in authority, for their forbearance in not having directed force to have been, *at the first moment*, repelled by force,—it being the highest humanity to check the infancy of tumults.”<sup>1</sup>

The threatenings of the mob being narrated to Sir John Hawkins and another Middlesex magistrate, they proceeded, with a detachment of the guards, to Bloomsbury Square. Obtaining an interview with Lord Mansfield, they informed him of his danger, and proposed to station the soldiers in and around his house. To this he strongly objected, insisting that they should be marched off and concealed in a church at some distance. He was not actuated by any pedantic scruples about the lawfulness of employing the military on such an occasion, but he thought that the mob might be exasperated by the appearance of red coats, and trusted to the reverence habitually shown in England to the judges of the land in times of the greatest excitement and by the most abandoned classes. A pause of nearly half an hour occurred, and hopes were entertained that the alarm was groundless,—when distant yells were heard; and it was ascertained that an immense multitude, carrying torches and combustibles,

<sup>1</sup> Erskine's Speeches, vol. iii. p. 33.

were marching down Holborn, and entering Bloomsbury Square. Lord Mansfield did not immediately fly,—not even when he saw them making for the north-east corner of the square, in which his house stood; but when they began to batter his outer door, he retreated by a back passage with the Countess; and he had hardly escaped from their fury when their leaders were seen at the upper windows, tearing down and throwing over furniture, curtains, hangings, pictures, books, papers, and every thing they could lay their hands on, likely to serve as fuel for the fire which was already blazing below. In this instance resembling a Paris mob, they declared that there was to be no pillage, and that they were acting on principles. Pilferers were punished; and one ragged incendiary, to show his disinterestedness, threw into the burning pile a valuable piece of silver plate and a large sum of money in gold, which he swore should “go in payment of masses.” Flames were speedily vomited from every window; and, as no attempt was or could be made to arrest their progress, long before morning nothing of the stately structure remained but the bare and blackened skeleton of the walls.<sup>1</sup>

Lord Mansfield and the public sustained a heavy loss on this occasion. His library containing the collection of books he had been making from the time he was a boy at Perth School, many of them the cherished memorials of early friendship,—others rendered invaluable by remarks in the margin, in the handwriting of Pope or Bolingbroke, or some other of the illustrious deceased wits and statesmen with whom he had been familiar. Along with them perished the letters between himself, his family, and his friends, which he had been preserving for half a century as materials for Memoirs of his times. It is likewise believed that he had amused his leisure by writing, for posthumous publication, several treatises on juridical subjects, and historical essays, filling up the outline of the admirable sketch he had given in his “Letters of Advice to the Duke of Portland.” All his MSS. had remained in his town house, and they were all consumed through the reckless fury of illiterate wretches, who were incapable of forming a notion of the irreparable mischief they were committing.

The public sympathy was testified by many metrical effusions, which appeared in the newspapers. Of these, the most pleasing were the following stanzas by Cowper:—

“So then—the Vandals of our isle,  
Sworn foes to sense and law,  
Have burnt to dust a nobler pile  
Than ever Roman saw!

<sup>1</sup> Welsby, p. 432. The House of Lord Chancellor Thurlow, in Ormond Street, was likewise threatened, but escaped. According to a story circulated at the time, and often repeated since, it was saved by his manœuvre of marching and counter-marching a serjeant's guard, so as to make the mob believe that he was defended by a great army. Holliday concludes his narrative of Lord Mansfield's disaster by observing—“In this instance we can only lament that so great a lawyer and statesman was not, in this hour of imminent danger, so great a general as the then Lord Chancellor”—(p. 411.) But Thurlow was not by any means equally unpopular; for though indifferent about religion, and despising the restraints of morality, he had always shown himself a very zealous friend of the Established Church and a determined enemy of Dissenters.



“And Murray sighs o’er Pope and Swift,  
And many a treasure more,  
The well-judg’d purchase and the gift,  
That grac’d his letter’d store.

“Their pages mangled, burnt, and torn,  
Their loss was his alone;  
But ages yet to come shall mourn  
The burning of his own.

\* \* \* \* \*

“When wit and genius meet their doom  
In all-devouring flame,  
They tell us of the fate of Rome,  
And bid us fear the same.

“O’er Murray’s loss the Muses wept:  
They felt the rude alarm;  
Yet bless’d the guardian care that kept  
His sacred head from harm.

“There memory, like the bee that’s fed  
From Flora’s balmy store,  
The quintessence of all he read  
Had treasured up before.

“The lawless herd, with fury blind,  
Have done him cruel wrong:  
The flowers are gone; but still we find  
The honey on his tongue.”

The venerable Chief Justice must have been most of all gratified by the filial solicitude of the members of his own profession. For a few days after the fire he did not appear in court. “The reverential silence (says Lord Glenbervie, then the reporter [JUNE 14.] of his decisions) which was observed when his lordship resumed his place on the bench, was expressive of sentiments of condolence and respect more affecting than the most eloquent address the occasion could have suggested.”<sup>1</sup>

It may be proper here to mention, that while many others, who had been his fellow sufferers, brought actions against the hundred for an indemnity, he waved this remedy, thinking his real loss to be inappreciable, and, on account of his great wealth, not wishing to throw any part of the pecuniary damage on shoulders less able to bear it. In answer to an application from the solicitor to the Treasury, in consequence of a vote of the House of Commons for an estimate of the value of his property which had been destroyed, he said,—

“Besides what is irreparable, my pecuniary loss is great. I apprehended no danger, and therefore took no precaution. But, how great soever that loss may be, I think it does not become me to claim or expect reparation from the state. I have made up my mind to my misfortune as I ought; with this consolation that it came from those whose object manifestly was general confusion and destruction at home,

<sup>1</sup> Doug. 446.

in addition to a dangerous and complicated war abroad. If I should lay before you any account or computation of the pecuniary damage I have sustained, it might seem a claim or expectation of being indemnified.—Therefore you will have no further trouble on this subject from, &c,

“MANSFIELD.”

One good effect produced by the conflagration in Bloomsbury Square was, that it roused the government from lethargy. A council was called, at which the King presided in person and showed more energy than any of his ministers. Having obtained the opinion of Mr. Wedderburn, the Attorney General, that by the law of England the force necessary to prevent the perpetration of crimes may be lawfully used, and that all the subjects of the realm, whether soldiers or civilians, may be lawfully employed in restoring and preserving the public peace, he gave orders to the military to act with the requisite vigor; and several regiments of militia, as well as of the line, having arrived from distant parts of the kingdom, a few volleys, well directed, speedily restored the metropolis to a state of the most perfect tranquillity.

When the two Houses again met, according to the adjournment, the King said to them, in a speech from the throne,—

“The outrages committed by bands of lawless and desperate men, in various parts of this metropolis, broke forth with such violence into acts of felony and treason, and had so far overborne all civil authority, and threatened so directly the immediate subversion of all legal power, the destruction of all property, and the confusion of every order in the state that I found myself obliged by every tie of duty and affection to my people to suppress, in every part, those rebellious insurrections, and to provide for the public safety by the most effectual and immediate application of the force intrusted to me by Parliament.”

The address, approving of what his Majesty had done, meeting with some opposition from the Duke of Manchester and other peers, who intimated an opinion that the employment of the military to quell riots by firing on the people could only be justified, if at all, by martial law proclaimed under a special exercise of the royal prerogative, Lord Mansfield rose, while every eye was fixed upon him, and all held their breath, eager to catch every accent that fell from his lips. Considering his age, his experience, his reputation as an oracle of the common law, the perils to which he had recently been exposed, and the loss which he had suffered, we need not wonder at the interest which he now excited.

“My Lords,” said he, “I wish it had not fallen to my lot to address you on this occasion, but I must not shrink from a task which duty imposes upon me. That the law may be obeyed, it must be known. My Lords, the noble Duke who last addressed the House is utterly mistaken in supposing that the employment of the military to suppress the late riots proceeded from an extraordinary exertion of the royal prerogative, and in his inference that we were living under martial law. I hold that his Majesty, in the orders he issued by the advice of his ministers, acted

perfectly and strictly according to the common law of the land and the principles of the constitution ; and I will give you my reasons within as short a compass as possible. I have not consulted books ; *indeed I have no books to consult.* [Deep sensation.] But, as well as my memory serves me, let us see, my Lords, how the facts and the law stand, and reflect a light upon each other. The late riots were formed upon a systematic plan to usurp the government of the country ; the rioters levied war against the King in his realm, and committed overt acts of high treason. Insurrections for a general purpose—as, to redress grievances real or pretended,—amount to a levying of war against the King, though they have no design against his person, because they invade his prerogatives and the power of parliament, which he represents. The insurgents avowedly sought by force to compel the legislature to repeal a statute ; they violently assaulted the two Houses of Parliament while engaged in legislative deliberation ; and, when left to themselves by the adjournment of the two Houses and the inaction of the executive government, *which it is not my part to censure* [sensation] without formally promulgating a new constitution, they for some days usurped supreme authority, and acted as masters of this metropolis. Besides high treason, my Lords, they were guilty of many acts of felony, by burning private houses, and stealing as well as destroying private property. Here, then, my Lords, we shall find the true ground upon which his Majesty (by the advice of his ministers, I presume) proceeded. I do not pretend to speak from any previous knowledge or communication, for I never was present at any consultation upon the subject, or summoned to attend, or asked my opinion, or heard of the reasons which induced the Government to remain passive so long and to act at last. [Wonder expressed by the bystanders, and scornful glances cast upon the Treasury bench ] But, my Lords, I presume it is known to his Majesty's confidential servants, that every individual, in his private capacity, may lawfully interfere to suppress a riot, much more to prevent acts of felony, treason, and rebellion. Not only is he authorised to interfere for such a purpose, but it is his duty to do so ; and, if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens. It is the peculiar business of all constables to apprehend rioters, to endeavor to disperse all unlawful assemblies, and, in case of resistance, to attack, wound, nay, kill those who continue to resist :—taking care not to commit unnecessary violence, or to abuse the power legally vested in them. Every one is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act under the color or pretext of law. The persons who assisted in the suppression of these tumults are to be considered mere private individuals, acting as duty required. My Lords, we have not been living under martial law, but under that law which it has long been my sacred function to administer. For any violation of that law, the offenders are amenable to our ordinary courts of justice, and may be

tried before a jury of their countrymen. Supposing a soldier, or any other military persons, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt that he may be punished, not by a court-martial, but upon an indictment to be found by the great inquest of the City of London or the County of Middlesex, and disposed of before the erminent judges sitting in Justice Hall at the Old Bailey. Consequently, the idea is false that we are living under a military government or that since the commencement of the riots, any part of the laws or of the constitution has been suspended or dispensed with. I believe that much mischief has arisen from a misconception of the Riot Act, which enacts that, after proclamation made that persons present at a riotous assembly shall depart to their homes, those who remain there above an hour afterwards shall be guilty of felony, and liable to suffer death. From this it has been imagined that the military cannot act, whatever crimes may be committed in their sight, till an hour after such a proclamation has been made, or, as it is termed, 'the Riot Act is read.' But the Riot Act only introduces a new offence—remaining an hour after the proclamation—without qualifying any pre-existing law, or abridging the means which before existed for preventing or punishing crimes.

"I am fully persuaded that none of your Lordships will think that the acts of violence lately directed against myself can influence my exposition of the law, or can alter my principles. Although it so happened that I never once spoke in this House in support of the obnoxious bill to mitigate Roman Catholic penalties, and, as far as I recollect, I was not present when it passed through any of its stages, I approved, and I approve, of its principle. My desire to disturb no man for conscience' sake is pretty well known, and, I hope, will be had in remembrance. I have no leaning to Roman Catholics. Many of those who are supposed to have directed the late mobs are not ignorant of my general tolerating principles when the toleration of sectaries does not portend danger to the state. I have shown equal favor to dissenters from the established Church of all denominations; and, in particular, those called *Methodists* can bear witness that I have always reprobated attempts to molest them in the celebration of their religious worship as unworthy of the apostolical protestantism which we profess; the purity of whose doctrines, and not persecution, should be the only incentive to bring proselytes into her bosom. I was, and am, of the same opinion with respect to the Roman Catholics; and, although I had no hand, directly or indirectly, in the law which has furnished a pretext for the late dangerous insurrections, I shall ever be of opinion that they, in common with the rest of his Majesty's subjects, should be allowed every possible indulgence consistent with the safety of the empire.

"Upon the whole, my Lords, while I deeply lament the cause which rendered it indispensably necessary to call out the military, and to order them to act in the suppression of the late disturbances, I am clearly of opinion that no steps have been taken for that purpose which were not strictly legal, as well as fully justifiable in point of policy. Certainly,



the civil power, whether through native imbecility, [a smile], through neglect, or the very formidable force they would have had to contend with, were unequal to the task of putting an end to the insurrection. When the rabble had augmented their numbers by breaking open the prisons and setting the felons at liberty, they had become too formidable to be opposed by the staff of a constable. If the military had not acted at last, none of your Lordships can hesitate to agree with me that the conflagrations would have spread over the whole capital; and, in a few hours, it would have been a heap of rubbish. The King's extraordinary prerogative to proclaim martial law (whatever that may be) is clearly out of the question. His Majesty, and those who have advised him (I repeat it), have acted in strict conformity to the common law. The military have been called in—and very wisely called in—not as *soldiers*, but as *citizens*. No matter whether their coats be red or brown, they were employed not to subvert, but to preserve, the laws and constitution which we all prize so highly."

Lord Mansfield sat down in the midst of a reverential silence more flattering to him than the loudest cheers, and the address was immediately carried *nemine dissente*.<sup>1</sup>

Bishop Newton, who was present, says, "It was really wonderful, after such a shock as he had received, that he could so soon recollect himself, and so far summon up his faculties as to make one of the finest speeches ever heard in parliament, to justify the legality of the late proceedings on the part of the Government, to demonstrate that no royal prerogative had been exerted, no martial law had been exercised, [A. D. 1781.] nothing had been done but what every man, civil or military, had a right to do in the like cases."<sup>2</sup>

Lord Mansfield was soon after placed in a very delicate situation, which required both caution and firmness; he had to preside in the Court of King's Bench at the trial of Lord George [FEB. 3.] Gordon, who stood charged with high treason. It was a high compliment to the known impartiality of English judges, that neither the prisoner himself, nor his counsel nor his friends were at all alarmed at his fate being placed in the hands of one who had suffered so deeply from the consequences of the acts to be investigated, and who had already pronounced a strong opinion upon the character of those acts. During the whole proceeding, Lord Mansfield showed himself free from the slightest tinge of resentment or prejudice; but, at the same time, he made no parade of generosity of feeling.

There could be no doubt that the acts of the insurgents, during the last days of the riots, did amount to high treason: but the grand question was, how far the prisoner was to be considered privy to them,—for although he had headed the procession to present the petition, and had then been guilty of great intemperance of language by which the mob were excited to violence, he had afterwards attempted to control them, and had actually offered to assist the sheriffs in restoring tranquility.

Luckily for him, he was defended by an advocate who on this occasion

<sup>1</sup> 21 Parl. Hist. 688—698.

<sup>2</sup> Bishop Newton's Memoirs.

first gave full proof of those wonderful powers which afterwards rendered his name so illustrious. It had been said that Lord Mansfield resembled Cicero in having his house burnt down by the "modern Claudius." Thus Erskine turned to the advantage of his client an incident which seemed so perilous:—

"Can any man living believe that Lord George Gordon could possibly have excited the mob to destroy the house of that great and venerable magistrate, who has presided so long in this high tribunal that the oldest of us do not remember him with any other impression than the awful form and figure of justice,—a magistrate who had always been the friend of the Protestant dissenters against the ill-timed jealousies of the Establishment,—his countryman too,—and, without adverting to the partiality, not unjustly imputed to men of that country, a man of whom any country might be proud? No, gentlemen, it is not credible that a man of noble birth and liberal education (unless agitated by the most implacable personal resentment, which is not imputed to the prisoner) could possibly consent to this burning of the house of Lord Mansfield."

The Chief Justice again laid down the doctrine that an insurrection to redress a general grievance, or to compel the repeal of a law, is a levying of war and high treason, whether the grievance be real or imaginary, whether the law be good or bad; and he fairly left two questions to the jury: 1st, Did the insurgents intend by force to compel the repeal of the statute passed to mitigate the penalties to which Roman Catholics were subject?—and 2dly, Did the evidence clearly prove that Lord George Gordon had participated in this intent by calling such an assemblage to present the petition of the Protestant Association, by meeting them in St. George's Fields, by leading them to the House of Commons, by addressing them when they were in possession of the lobby, by wearing for two days the blue cockade, which was the badge of the insurgents, or by any other part of his conduct? With perfect candor he likewise pointed out the circumstances favorable to the prisoner; and he advised the jury, if they thought the scale hung doubtful, to lean to the side of mercy.

It is well known that Lord George Gordon was acquitted; and certainly to have convicted him upon acts so indirectly tending to a levying of war, or compassing the King's death, would have been establishing a very dangerous precedent of *constructive treason*.<sup>1</sup>

<sup>1</sup> 21 St. Tr. 485—652.

## CHAPTER XXXIX.

CONTINUATION OF THE LIFE OF LORD MANSFIELD TILL HE RESIGNED  
THE OFFICE OF CHIEF JUSTICE.

LORD MANSFIELD continued to perform his judicial duties with unabated energy, and with still increased respect; but henceforth he acted a much less conspicuous part on the political stage. [A. D. 1781.] Lord Thurlow was jealous of his influence with the King; there had for some time been a coldness between him and the Ministry, and this was considerably aggravated by his civil sneers at their inaction during the late riots. To opposition he had an innate dislike, which stuck by him all his life; and he differed altogether from the Rockingham and Shelburne Whigs, who were now pressing on Parliament pacification with America and economical reform. Therefore, till Lord North's resignation, he seldom attended in the House of Lords; and he only spoke on such dry subjects as the government of the Isle of Man,<sup>1</sup> the expediency of a bill for the discharge of insolvent debtors,<sup>2</sup> whether government contractors should be allowed to sit in the House of Commons,<sup>3</sup> and whether the corrupt electors of the borough of Cricklade ought to be disfranchised?<sup>4</sup> In the debates arising out of the surrender of Lord Cornwallis to General Washington, the commencement of hostilities with France and Spain, and the armed neutrality of the Northern Powers, he remained silent. When present in the House, and sitting solitary on a back bench, he showed great dejection of countenance which was supposed to arise not alone from public disasters, but partly from the consciousness of his own loss of consequence, and the recollection of the brilliant though anxious nights when, matched against the elder Pitt, he had commanded the applause of listening senates.

On the 1st of January, 1782, he received the following melancholy salutation from the Bishop of Bristol :—

“Give me leave, at the coming in of the new year, to address your Lordship with the old wish of *multos et felices*. I am happy to hear from all friends so good an account of your health; and I rejoice in it for the sake of the public as well as your own, yours being a life of the greatest consequence, an ornament and blessing to your country. Mine is but labor and sorrow, and I have often occasion devoutly to wish ‘*Lord, now lettest thou thy servant depart in peace.*’ Never having been strong and healthy, it is no wonder, that, entering into the seventy-ninth year of my age, I bow under a load of growing evils.”

Lord Mansfield returned by the messenger a melancholy answer :—

“A thousand thanks to you for your most friendly letter. We two are almost left alone. Thank God, I go down the hill without pain except for the public; and, if the Brest fleet and convoy are dispersed and

<sup>1</sup> 22 Parl. Hist. 561.

<sup>2</sup> *Ib.* 628.

<sup>3</sup> *Ibid.* 1364.

<sup>4</sup> *Ib.* 1383—1388.

driven back, this year opens propitiously. Lady Mansfield, blessed be God, has had a miraculous recovery from a very sudden and violent illness. Prudence on her account has kept me hitherto in town these holidays. I hope to be able soon to have the pleasure of seeing you, and thanking you personally for your kind remembrance of

“Yours most affectionate, &c.

“MANSFIELD.”

During the successive short administrations of Lord Rockingham and Lord Shelburne he still maintained his neutrality, refusing even to offer any opinion upon the preliminaries of peace by which American Independence was acknowledged and important concessions were made to the House of Bourbon. Thurlow remained Chancellor, though often capriciously opposing his colleagues, and his course was so erratic that there was great difficulty either in going along with him or abandoning him.

On the formation of the Coalition Ministry, Lord Mansfield was induced by his old friend Lord North to lend it his countenance, notwithstanding his “friendship” for George III. He declined to re-enter the [FEB. 1783.] Cabinet, but, the great seal being put into commission, he agreed again to act as Speaker of the House of Lords. During the stormy period which followed, he occasionally left the wool-sack and said a few words when he thought he could do a good turn to the Government, while Lord Loughborough stood forth as its regular champion. There being a furious opposition stirred up against the Receipt Tax, now devised for the first time by Mr. Fox and Lord John Cavendish,<sup>1</sup> various peers came down to the House loaded with petitions against it; but Lord Mansfield not only asserted the rule that no petition against the imposition of a tax can be received, but took occasion to point out the necessity for contributing to the necessities of the public service and the great danger to be apprehended from the prevalence of delusion and faction on such a subject.<sup>2</sup>

While the tempest raged in the Lower House, the Upper was comparatively tranquil, and Lord Mansfield had little else to do beyond putting the question nightly upon the adjournment. But at last the famous India Bill was delivered at the bar by Mr. Fox, attended by a numerous band of coalitionists. From the growing unpopularity of the cabal against the just rights of the Crown, between those who had recently threatened to bring each other to the block for their political misdeeds, a resolution had been taken, with the concurrence of the King to reject the measure and to get rid of its framers at the same time; and all men saw that a death struggle was at hand. The opposition to the

<sup>1</sup> The following epigram was told me many years ago by an old lawyer, who pretended that he had made it on this occasion, to celebrate Fox’s extravagance and poverty. I know not whether it has before been in print:—

“Said Charles, ‘Let us a tax devise  
That will not fall on me;’

‘Then, tax RECEIPTS,’ Lord John replies,  
‘For those you never see.’”

<sup>2</sup> 23 Parl. Hist. 1029.



bill was manifested with violence before it had been read a first time; but the policy of its opponents was—not to come to a decision upon it till it had been further damaged in public opinion and the cry of “No Coalition” should have gathered still more strength. Therefore, after much abuse, it was allowed to be read a first and second time, and the petitioners against it were then to be heard with their evidence at the bar, This policy proving successful, many useless witnesses were examined, and their examinations were most tediously protracted. Lord Mansfield presided on the woolsack; and often tried by interposing, to check irrelevancy and repetition; and he soon found that there was a decided majority of the Peers ready to vote for whatever Lord Thurlow, now the avowed leader of the Opposition, might propose.

At last Lord Loughborough, after a bitter invective against the counsel of the East India Company for the manner in which, “in obedience to their instructions,” they had been [DEC. 15.] wasting the time of the House, rather imprudently moved, “that they be restrained from going into proofs of the Carnatic having been evacuated, and peace being established there, as it was a fact universally admitted.”

Thurlow saw the advantage his party would have in taking a division on this question, and made a violent speech against those who wished to stifle inquiry and were resolved at once to invade the rights of private property and the prerogatives of the Crown.

Lord Mansfield left the woolsack, and in a calm, judicial, mediating tone, expressed a hope that the House would come to some understanding as to the manner in which the inquiry should be conducted, without putting the question which had been moved:—

“He was inclined,” he said, “to think that a great deal of the evidence which had already been produced might have been spared; but where a bill was depending which materially affected the property of individuals, it was usual for the House to allow them every indulgence possible, and to use as much delicacy in passing such a bill as the nature of the case would admit. The measure, though perhaps necessary and expedient for the public good, certainly was severe upon the petitioners, by depriving them of the management of their own concerns; and for this reason it was that their Lordships hitherto had shown such exemplary patience while they might have complained that their time was wasted. It was impossible to say that the present state of the Carnatic might not be material for their consideration, and various opinions might be entertained as to the mode in which that province had been and ought to be governed. He owned that the bill was of the highest importance, and that their Lordships should come to a decision upon it with all convenient despatch; but still he trusted that his noble and learned friend would waive his motion, and that the House would permit the counsel to proceed.” *Lord Loughborough*: “My Lords, I have no difficulty in complying with a request coming from a quarter which I so much respect. Therefore, with the permission of your Lordships, I withdraw my motion.” *Lord Mansfield*: “Call in the counsel for the

petitioners. Gentlemen, you will proceed with your evidence, the House confiding in your professional honor that you will only offer that which you believe to be material for our information.”<sup>1</sup>

When it was judged that the public mind was in a fit state for receiving the dismissal of the Ministers, who were still supported by a large majority of the House of Commons, the evidence was closed, the bill was rejected, and Mr. Pitt was declared Prime Minister.

The great seal being taken out of commission and restored to Lord [DEC. 23.] Thurlow, Lord Mansfield surrendered the woolsack to him, having occupied it on this occasion nearly a twelvemonth.

He had but an indifferent opinion of the young gentleman who, at the age of twenty-four, was now trusted with supreme power, notwithstanding the accounts he received of his extraordinary eloquence. The prejudice he entertained against the name of Pitt was greatly strengthened by the part which the youthful orator had taken in denouncing ministerial corruption and in advocating parliamentary reform. On the other side, there were rankling recollections of the long hostility which had prevailed during the life of the sire, and the indifference manifested at his death, which the son himself had witnessed.

Lord Mansfield like all the world, believed at first that the new administration must be short-lived, and he was willing to [FEB. 4, 1784.] contribute his aid to overthrow it. When a resolution was moved in the House of Lords against the conduct of the majority of the House of Commons in obstructing the exercise of the King's right to choose his ministers, Lord Mansfield opposed it in a speech which is memorable as the last he ever delivered in parliament:—

“Every man,” said he, “who is called upon to consider a great measure ought to begin at the end; in other words, before he adopts it he ought to examine the consequences that will probably flow from it. Thus a Roman prætor, whenever a new proposition was made to him, used always to ask *cui bono?*—and I may with propriety add *cui malo!* for the evils to ensue are to be regarded as well as the benefits expected from it. Looking at the resolution before us, I behold it with trembling. I have never risen to speak to a question with such anxiety in my life. I scarcely know how to express myself. It had pleased his Majesty to change his ministers under circumstances which caused violent conflicts in parliament. Now it is agreed on all hands that an abatement of these conflicts is desirable; that in the depressed state of the nation union is the one thing needful. I hope God Almighty in his goodness will instil concord into the hearts of the inhabitants of this ill-fated country, and thus effect our salvation from almost certain perdition. Will the present resolution, if passed, tend to such a consummation? We are told that there is no wish to disturb the harmony between the two Houses. Then why pass a resolution which must produce a quarrel between them—to the entire obstruction of public business? What is the remedy? A dissolution of parliament! But a dissolution of parliament in the present situation of affairs is utterly impracticable. We have no time to spare;

<sup>1</sup> 24 Parl. Hist. 146—150.

we are even now at the last hour. The ship sinks while we are deliberating on what course we should steer. I speak merely from a sense of the extreme peril to which we are exposed, and not from any view to this or that administration. There are in the present Administration able and respectable men, but I wish to God that it had more strength. At this moment the strongest administration is the best, and any administration competent to deliver us from the appalling dangers with which we are environed shall have my support. The proposed resolution declares an abstract proposition, which no one can deny, 'that neither House of Parliament has power to suspend or alter the law of the land.' What necessity can there be for such a declaration? and what good can arise from it? If the Commons have made any attempt of this nature, their act is a nullity, and no one need respect it. But do you not needlessly insult them by telling them that they have done so; and may it not be dreaded that, following your example, and forgetting the public welfare, they may seek blindly to gratify the factious inclination for mischief which you impute to them? Before you render a dissolution of parliament indispensable, think for a moment of the evils which must ensue. Are you prepared to disband the army, to lay up the navy, to paralyse all the operations of government, and to expose yourselves to the machinations of rival states which have so recently conspired your destruction? I own I tremble at the precipice on which we stand. If any persons have been guilty of a crime against the constitution, let them be impeached and legally tried. No injury can arise from the exertion of constitutional means of enforcing the law; but do not wantonly pass a resolution which can neither prevent nor punish crime, which can only be meant as an insult to the representatives of the people, and which may prove the signal for universal confusion in the country."

The resolution, however, was carried by a majority of 47; and was followed by an address to his Majesty, engaging to support him in the exercise of his prerogative of choosing his ministers.<sup>1</sup> Upon this occasion the House of Lords was the rallying point for public opinion, and an instance was afforded of the necessity for two deliberative assemblies in framing a free constitution.

In the course of the ensuing month a dissolution of parliament did take place, when the coalitionists were scattered to the winds. [MARCH.] A House of Commons was returned which made Mr. Pitt the most powerful minister who held office during the long reign of George III., and till the breaking out of the French Revolution he governed the country with consummate prudence and signal success.

Lord Mansfield's political career must here be considered as closed. After the meeting of the new parliament he took his seat in the House of Lords, and occasionally attended to the judicial business which came before it, but he never again opened his mouth in debate. I hope he was pleased to find that his predictions respecting the ruin of the empire were not verified, and that, as his bodily vigor declined, he was not distracted by party squabbles from the discharge of his forensic duties.

He continued to preside in the Court of King's Bench several years longer, as much admired as ever for the intellectual qualities he displayed, and, if possible, more revered from the venerable age he had attained.

The great question was revived respecting the rights of juries on trials for libel. In the famous case of the DEAN OF ST ASAPH, who was prosecuted for publishing a very harmless dialogue written by Sir William Jones, Mr. Justice Buller having told the jury that they were not entitled to form any opinion upon the character of the paper charged as libellous, Erskine, his counsel, moved for a new trial, on the ground of misdirection, and, in support of his motion, delivered the finest juridical argument to be found in the annals of Westminster Hall. However, as he himself afterwards confessed, this effort was without any hope of success, and was only intended to draw the attention of the public to the subject, with a view to obtain redress by legislation.<sup>1</sup> Lord Mansfield thus delivered judgment:—

“The objection so confidently relied upon might have been made upon every trial for a libel since the Revolution, now near one hundred years ago. In every subsequent reign there have been many such trials, arising out of prosecution both of a private and public nature; and several of these have been defended with all the acrimony of party animosity, and a spirit ready to admit nothing and to contest everything. During all this time, as far as can be traced, the direction of every judge has been substantially the same as that of my brother Buller; and, till the reign of George III., no complaint was made of it by a motion to the Court. The counsel for the Crown, to remove the prejudices of a jury and to satisfy the bystanders, have expatiated upon the enormity of the libels; judges, with the same view, have sometimes done the same thing: both have done it wisely with another view—to obviate captivating harangues tending to show that the jury can and ought to find that the paper is no libel. It is difficult to cite cases; the trials are not printed, and nobody takes notes of a direction which is not disputed. We must in all cases of tradition trace backwards, and presume from usage which is remembered that the precedent usage was the same. The *King v. Clarke* was tried before Lord Raymond, and there he expressly lays it down ‘the fact of printing and publishing only is in issue.’ The CRAFTSMAN was a celebrated party paper, written, in opposition to the ministry of Sir Robert Walpole, by many men of high rank and great talents. The Government at last would bear its licentiousness no longer, and the famous *Hague letter* was selected as a fit subject of prosecution.<sup>2</sup> I was present at the trial. There was a great concourse of people, and many distinguished political characters were present to countenance the defendant. Mr. Fazakerley and Mr. Bootle, (afterwards Sir Thomas Bootle) were counsel for the defendant. They started every objection and labored every point as if the fate of the empire had been at stake. When the judge overruled them, he usually said, “If I am wrong, you know where to apply.” The Judge was my Lord Raymond, who had

<sup>1</sup> Lives of the Chancellors, vi. 463, n.

<sup>2</sup> Rex v. Francklyn, 17 St. Tr. 625., A. D. 1731.



been eminent at the bar in the reign of Queen Anne, had been Solicitor and Attorney General in the reign of George I., and was intimately connected with Sir Edward Northey, who had been engaged in many state trials before the Revolution. He must, therefore, have been well acquainted with the ancient practice. Yet, when he comes to sum up, he says, 'The are three things for consideration:—1. the fact of publication; 2. the meaning of particular words (these two are for the jury); 3. the question of law or criminality, and that is upon the record for the Court.' Mr. Fazakerley and Mr. Bootle were, as we all know, able lawyers, and were allied in party to the writers of the *Craftsman*. Yet, after a verdict of *Guilty*, they never complained to the Court, and it never entered their heads that the direction was not according to law. I recollect one case afterwards in which, to the great mortification of Sir Philip Yorke, then Attorney General, the *Craftsman* was acquitted, and I recollect it from a famous witty and ingenious ballad that was composed on the occasion by Mr. Pulteney. Though it be a ballad, I will cite a stanza from it to show you the opinion upon this subject of the able men in opposition, and the leaders of the popular party in those days. They had not an idea that the jury had a right to determine upon a question of law, and they rested the verdict on another and better ground:—

‘For Sir Philip well knows  
That his *innuendoes*  
Will serve him no longer  
In verse or in prose;  
For twelve honest men have decided the cause  
Who are judges of fact though not judges of laws.’

“Here you have the admission of a whole party that the jury had no power beyond determining on the ‘*innuendoes*,’ or the meaning ascribed by the information to particular words; and they never made a pretence of any other power except when talking to the jury themselves.” After stating what his own practice had been since he became Chief Justice, he continued: “The constitution trusts that, under the direction of a judge, the jury will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law. They do not understand the language in which it is conceived or the meaning of the terms. They have no rule to go by but their affections and wishes. It is said that if a man gives a right sentence upon hearing one side only, he is a wicked judge, because he is right by chance only, and has neglected taking the proper method to be informed;<sup>1</sup> so the jury who usurp the judicature of law, though they happen to be right, are themselves wrong because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the judge to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences. To be free is to live under a government by law. The

<sup>1</sup> “Qui statuit rectum, parte inauditâ alterâ,  
Licet æquum statuerit, haud æquus est.”

liberty of the press consists in printing without any previous license, subject to the legal consequences. The licentiousness of the press is Pandora's box, the source of every evil. Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law; or, which is the same thing, no certain administration of law, by which individuals may be protected, and the state made secure. Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now in the present state of things puerile rant and declamation. The judges are totally independent of the ministers that may happen to be in power, and of the King himself. The temptation to be dreaded is rather the popularity of the day. But I agree with the observation cited by one of the counsel for the prosecution from Mr. Justice Foster, 'that a popular judge is an odious and pernicious character.' The judgment of the Court is not final, and, in the last resort, it may be reviewed in the House of Lords. In opposition to this, what is contended for? that the law shall be in every particular case what any twelve men who shall happen to be the jury shall be inclined to think,—liable to no review and subject to no control,—under all the prejudices of the prevailing popular cry, and under all the bias of interest in this metropolis, where thousands are concerned more or less in the manufacture of pamphlets, newspapers, and paragraphs. Under such an administration of law no man could tell, no counsel could advise, whether a paper is or is not punishable. I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics. Agreeable to the uniform judicial practice since the Revolution, warranted by the fundamental principles of the constitution, according to the maxims on which trial by jury is constituted, upon reason and fitness as well as authority, we are all of opinion that the direction at the trial was proper, and that this rule must be discharged."<sup>1</sup>

Upon a question so important in our constitutional history this exposition of the sentiments of Lord Mansfield must ever be interesting, although it be chargeable with some inaccuracy of statement, as well as fallaciousness of reasoning; and he lived to see the doctrine which he considers so clearly and satisfactorily settled upset by a declaratory act of parliament. He was quite wrong in his recollection of Pulteney's ballad on the acquittal of the *Craftsman*, which runs thus:

"For twelve honest men have determined the cause,  
WHO ARE JUDGES ALIKE OF THE FACTS AND THE LAWS."<sup>2</sup>

Although Lord Raymond and subsequent judges had ruled in the manner represented, the practice could not be distinctly carried farther back than his time; and, instead of being acquiesced in, the battle was renewed on every state prosecution for a libel. Lord Camden had often solemnly protested against Lord Mansfield's doctrine, and in the time of JUNIUS it had been reprobated in both houses of Parliament. Indeed, it rests upon the transparent fallacy, that whether a paper amounts to a

<sup>1</sup> 21 St. Tr. 847—1046.

<sup>2</sup> See *Lives of the Chancellors*, vol. v. pp. 25, 103, 136, 141, 176, 177, 206, 287.

libel or not is invariably a pure question of law. But all the judges supported Lord Mansfield's doctrine when consulted in the House of Lords on the introduction of Fox's Libel Bill, and there can be no doubt of the sincerity and honesty with which he laid it down and adhered to it. Erskine afterwards, in the defence of Paine, intimated how clearly the law was then supposed to be settled against him:—"I ventured to maintain this very right of a jury over the question of libel, before a noble and reverend magistrate of the most exalted understanding and of the most uncorrupted integrity. He treated me, not with contempt indeed, for of that his nature was incapable, but he put me aside with indulgence, as you do a child when it is lisping its prattle out of season." When the Libel Bill was receiving its final triumph in the House of Lords, Lord Camden beautifully alluded to the great man then on the verge of the tomb, whose doctrine was now for ever to be overthrown: "Though so often opposed to him, I ever honored his learning and his genius; and if he could be present, he would bear witness that personal rancor or animosity never mixed with our controversies."<sup>1</sup>

No one born in the reign of Queen Anne ought to be severely blamed for entertaining apprehensions for the safety of the state from permitting juries to determine what publications are innocent or criminal. We should recollect that Lord Somers and the leaders of the Revolution of 1688 would not venture for some years to allow printing without a previous license, and that, in the opinion of many of the most enlightened men in the next generation, a licenser could only be dispensed with upon the condition that the sentence upon writings after they were published should be pronounced by permanent functionaries whom the Crown should select for having a sufficient horror of every thing approaching to sedition. It was not till after a struggle of half a century, and under a minister then highly liberal (although he afterwards tried to hang a few of his brother reformers who continued steady in the cause<sup>2</sup>), that the bill passed declaring that, on a trial for libel, the jury, in giving their verdict, should have a right to take into consideration the character and tendency of the paper alleged to be libellous. Still the truth of the facts stated in the publication complained of could not be inquired into; for half a century longer the maxim prevailed, "the greater the truth the greater the libel," and it was only in the year 1845 that "Lord Campbell's Libel Bill" passed, permitting the truth to be given in evidence, and referring it to the jury to decide whether the defendant was actuated by malice, or by a desire for the good of the community.<sup>3</sup> These successive alterations of the law are now admitted to have operated beneficially—not only being favorable to free discussion, but really tending to restrain the licentiousness of the press. Candor, however,

<sup>1</sup> 29 Parl Hist. 1404—1534.

<sup>2</sup> Much to the credit of Mr. Pitt, he warmly supported Fox's Libel Bill with the whole influence of Government against Lord Thurlow and the tory lawyers, who eagerly opposed it. Yet, in little more than two years, the same Mr. Pitt tried to make an attempt to improve our representative system—an overt act of high treason.

<sup>3</sup> 8 & 9 Vict. c. 75.

requires the confession that they attended with some hazard, and we must not confound excessive caution with bigotry or a love of arbitrary government. The great problem for free states now to consider is, how journalism is to be rendered consistent with public tranquillity and the stability of political institutions. A licenser can never more be endured; and against a journal which daily excites to insurrection and revolution, a prosecution of the proprietor or printer for a libel—to be tried before a jury after the lapse of several months—affords no adequate remedy. If the great capitals of Europe are to be constantly in “a state of siege,” we may be driven to regret the quiet old times when royal gazettes, announcing court appointments, were the only periodicals.

There was one other interesting libel case before Lord Mansfield—[FEB. 1786.] which occurred shortly before his final retirement. This was an action for damages, most laudably commenced by Mr. Pitt, the Prime Minister, against the proprietor of the *MORNING HERALD* newspaper for several paragraphs which had appeared in successive numbers of that journal, accusing him of gambling in the Funds, and fraudulently availing himself of official information to make money on the Stock Exchange—with a statement that “his friends were deeply grieved by the discovery, but were trying to palliate his misconduct.” Erskine was counsel for the defendant, and, admitting that the paragraphs were without any foundation in truth, suggested that they had been inserted through inadvertence,—delivered a warm eulogium on the purity, disinterestedness, and stainless character of the illustrious plaintiff,—dwelt upon the high estimation in which he was held by the public,—insisted that he could have suffered nothing from an absurd charge which nobody believed,—and therefore urged the jury to award him only nominal damages.—Lord Mansfield, forgetting, as might be expected, the hereditary enmity between himself and the plaintiff, thus summed up:—

“Gentlemen of the jury: You have had a very ingenious speech, but upon the false principle that a man of the fairest character may be traduced with the greatest impunity. From defamation the law implies damage without actual proof; it is the province of the jury in their discretion to assess it; and, in doing so, they are to take into consideration the character and situation of the plaintiff, the malignity of the libel, and all the other circumstances which aggravate the intended wrong. Lord Sandwich proved no special damage from the libel upon him, yet the jury gave him 2000*l.*; and Lady Salisbury, the other day, recovered 500*l.* before me for a libel, although she could not have proved that any one thought the worse of her for being so libelled, and no one ever supposed that the jury was too lavish. The Right Honorable Gentleman who brings this action deserves the thanks of the public for submitting such a foul attack upon his character to the cognizance of you his countrymen. I agree with Mr. Bearcroft [counsel for Mr. Pitt] that it is scandalous in a private individual, who is in possession of political information which will influence the value of the Funds, to make a speculative bargain on the Stock Exchange with another man who is



ignorant of it, for they do not deal on equal terms; but in a minister of state such conduct is every way infamous. Besides trying to cheat the individuals with whom he bargains, he exposes himself to a powerful temptation, and gives himself an interest against his duty, which may prove the ruin of the nation. Suppose, on entering into a negotiation for peace, he buys largely for a future day, he has an inducement to submit to any terms, that peace may be concluded; and the sum that he realizes is as much a bribe as if he had received it from the enemy. The newspaper containing the charge is circulated all over the kingdom and all over Europe. How can the reader tell whether a story, told so circumstantially, may not be true in spite of the high reputation which the plaintiff has hitherto maintained? To be sure, many ministers have done the same; some have been known to do it,—some have been strongly suspected of doing it, while others have stood clear. The assessing of damages gentlemen, is entirely with you; but I must beg you to recollect that there is a very serious question before you, in which all the King's subjects are concerned,—whether there shall be any protection to the reputation of honorable men, either in public or private life? God forbid I should ever subscribe to the doctrine that the fairer a man's or woman's character may be, they are the less entitled to reparation when they are defamed!"

The jury found a verdict for the plaintiff, with 250*l.* damages.<sup>1</sup>

Lord Mansfield was now in his eighty-second year. Hitherto he had hardly ever been a day absent from his court since his first appointment as Chief Justice, and, except when he was upon the circuit, he rarely went farther from London than his villa at Kenwood, where his great amusement was ornamental gardening. But he at last found that old age had not in this case altogether lost its power in weakening muscles and stiffening joints; and, in the hope of renovating his frame, he repaired to Tunbridge Wells, which had long been a fashionable watering-place. Here he was worshipped as an idol; and much bad verse, both English and Latin, was offered up to him. I shall give specimens, the most favorable which I can select:—

INVOCATION TO THE NYMPH OF THE SPRING AT TUNBRIDGE WELLS, ON LORD MANSFIELD HAVING EXPRESSED AN INTENTION OF LEAVING THE PLACE. BY A LADY.

"Arise, fair Naiad! from thy well;  
Arise, and tune thy vocal shell,  
Try ev'ry soft bewitching art,  
To charm the ear and please the heart,  
Till Mansfield shall thy voice obey,  
And near thy spring consent to stay.  
Sweetly warble in his ear,  
'Health, and all her train are here;  
Health whose liberal hand bestows  
Nights of undisturb'd repose,  
Hours of social mirth and glee,  
Days of soft tranquillity.'"

<sup>1</sup> Political Anecdotes, i. 360—366.

EPIGRAM ON THE OCTOGENARIAN LORD MANSFIELD, BY THE REV. MR. MADDAN.

“Inter mortales vetus est vox veraque sæpe,  
Bis sunt infantes, qui senuere semel:  
At te lustrantes juvenemque senemque fatemur  
Te semel infantem, bis nituisse virum.”

The benefit he might have derived from this excursion was greatly impaired by an interview with his old friend Lord George Sackville, now Lord Viscount Sackville,—about to suffer under a sterner sentence than that pronounced upon him after the battle of Minden. The scene is thus graphically described by Richard Cumberland:—

“He wished to take his leave of the Earl of Mansfield, then at Tunbridge Wells: I signified this to the Earl, and accompanied him in his chaise to Stoneland. I was present at their interview. Lord Sackville just dismounted from his horse, came into the room where we had waited a very few minutes, and staggered as he advanced to reach his hand to his visiter. He drew his breath with palpitating quickness, and, if I remember rightly, never rode again. There was a deathlike character in his countenance, that visibly affected and disturbed Lord Mansfield in a manner that I did not expect, for it had more of horror in it than a firm man ought to have shown, and less perhaps of other feelings than a friend, invited to a meeting of that nature, must have discovered had he not been frightened from his propriety. Lord Sackville addressed him in the following words;—‘But, my good Lord though I ought not to have imposed upon you the painful ceremony of paying a last visit to a dying man, yet so great was my anxiety to return you my unfeigned thanks for all your goodness to me, all the kind protection you have shown me during my unprosperous life, that I could not know you were so near me and not wish to assure you of the *invariable respect I have entertained for your character*, and now in the most serious manner to solicit your forgiveness if I have appeared in your eyes, at any moment of my life, unjust to your great merits, or forgetful of your many favors.’ Lord Mansfield made a reply perfectly becoming and highly satisfactory.”<sup>1</sup>

It has been supposed that Lord Sackville’s object was by a dying declaration to remove from Lord Mansfield’s mind all suspicion of the truth of the story, then very generally circulated, that he was the author of the Letters of Junius. Whether such a suspicion had existed, or how far it was removed, I am unable to explain, for Lord Mansfield always observed a studied silence respecting the much agitated question of the authorship of these libels. He must have formed a shrewd conjecture as to the identity of his assailant,—but, like his opinion on the Middlesex election, *it died with him*.

The shock he sustained on this occasion might be caused merely by seeing a younger man than himself, with whom he had long been familiar, stepping into the grave.<sup>2</sup>

<sup>1</sup> Memoirs, vol. ii. p. 249–250. Cumberland says he does not trust to memory—he transcribes.

<sup>2</sup> Our Chief Justice seems then to have been affected very differently from what

After drinking the waters some weeks his strength was a little recruited, but when Michaelmas Term arrived he found his bodily infirmities multiply upon him, and he was unable to take his seat on the bench, although his mental faculties retained all their freshness. His great object now was, that Mr. Justice Buller should be his successor, and he would have been willing immediately to resign in favor of one whom he so much valued. Mr. Pitt, being sounded upon the subject, would not listen to what he considered a *job*. When he himself was at the bar, and went the Western Circuit, he had seen Buller try a *Quo Warranto* cause, upon which depended the right to return members of parliament for a Cornish borough long considered the property of the learned Judge himself. Pitt, anxious at once to promote the pure administration of justice and to reward a political partisan, who wished exceedingly to give the office to Sir Lloyd Kenyon, the Master of the Rolls, who was not only a very honest man and deep lawyer, but had been very useful to the Government in the Westminster election in 1784, when Mr. Fox was prevented from being returned for that city. As Lord Mansfield was balked in his wishes, he continued to hold his office—no doubt being flattered by physicians into the hope that he might recover his vigor and resume his seat—but, I believe, principally influenced by the belief that Buller, having a [A. D. 1788.] full opportunity to display his learning and talents, would acquire such reputation that, by the public voice, the Government would be compelled to appoint him. Ashurst was the senior puisne judge, and nominally presided, but Buller took the decided lead, and for seven terms—extending over nearly two years—he acted the part of Lord Chief Justice. He gave considerable satisfaction by his quickness, his assiduity, and his thorough acquaintance with every branch of his profession,<sup>1</sup> but Mr. Pitt remained inflexible—saying “he could not forget the trial at Bodmin

might have been expected from his own notion of human nature, as expressed by him when, a much younger man, if we may believe the following anecdote:—“Lord Mansfield was in the habit of intimacy with Bishop Trevor, who being much indisposed, Lord Mansfield called to see him; and while he was in the room with the bishop’s secretary for a minute, the late Dr. Addington, his physician, was brought in a chair by two able-bodied chairmen, who were proceeding to carry him up stairs, pale and wan, and much debilitated, to his patient. The bishop’s secretary, fearing that his lord would be low spirited at such a scene, begged of Lord Mansfield to interpose and go up first. The quickness of the reply could not fail to be treasured up. It was, ‘By no means; let him go; you know nothing of human nature: the bishop will be put in good spirits on seeing any one in a worse condition than himself.’ Lord Mansfield was prophetic; and, on Dr. Addington’s taking leave, the chairman had no sooner quitted the room with the sick-fare than the bishop humorously said, ‘I fear the crows will soon have my excellent physician.’ But in this he was mistaken. Bishop Trevor died in a few weeks. Dr. Addington lived many years after he had been consigned to the crows by his princely patient the Bishop of Durham.”—See *Holliday*, 184.

<sup>2</sup> Durnford and East’s Reports, vols. i. and ii., bear creditable testimony to his powers as a judge; and I make no doubt that he would have acquitted himself very respectably as the successor of Lord Mansfield. To cover his mortification, on the appointment of Lord Kenyon, he soon left the Court of King’s Bench, and hid himself in the Common Pleas.

any more than the merits and services of Sir Lloyd." He likewise threw out some doubts as to the propriety of a high judicial in office being so long held by one disabled by age from discharging its duties, and the difficulty he should have to defend this affair if it should unfortunately be mooted in the House of Commons.

On the 4th of June, 1788, Lord Mansfield sent in his resignation. A meeting was immediately called of the members of the King's Bench bar, who not only revered his high judicial qualities, and were flattered by the splendor he had cast upon their order but were warmly attached to him by the courtesy and kindness with which he had ever treated them.<sup>1</sup> Having delivered warm encomiums upon his character and conduct, they unanimously resolved that a valedictory address should be presented to him in the manner that, upon inquiry, should be found most agreeable to his feelings; and the manner of presenting it was left to the Hon. Thomas Erskine, who had for some years been their distinguished leader.

After proper inquiry, he wrote the following letter, and dispatched it by a messenger to Kenwood:—

"My Lord,—It was our wish to have waited personally upon your Lordship in a body, to have taken our public leave of you, on your retiring from the office of Chief Justice of England; but, judging of your Lordship's feelings upon such an occasion by our own, and considering, besides, that our numbers might be inconvenient, we desire in this manner affectionately to assure your Lordship, that we regret, with a just sensibility, the loss of a magistrate whose conspicuous and exalted talents conferred dignity upon the profession, whose enlightened and regular administration of justice made its duties less difficult and laborious, and whose manners rendered them pleasant and respectable.

"But, while we lament our loss, we remember, with peculiar satisfaction, that your Lordship is not cut off from us by the sudden stroke of painful distemper, or the more distressing ebb of those extraordinary faculties which have so long distinguished you amongst men; but, that it has pleased God to allow to the evening of an useful and illustrious life, the purest enjoyments which nature has ever allotted to it,—the unclouded reflections of a superior and unfading mind over its varied events, and the happy consciousness that it hath been faithfully and eminently devoted to the highest duties of human society, in the most distinguished nation upon earth. May the season of this high satisfaction bear its proportion to the lengthened days of your activity and strength!"

While the messenger waited, Lord Mansfield penned and despatched the following answer:—

"Dear Sir,—I cannot but be extremely flattered by the letter which I this moment have the honor to receive. If I have given satisfaction,

<sup>1</sup> It was thought better not to call a meeting of the whole Bar of England, for in that case Sir John Scott, the Attorney General, must have presided; and he was well known to bear a grudge to Lord Mansfield, and was always disposed to *vilipend* him.



it is owing to the learning and candor of the Bar. The liberality and integrity of their practice freed the judicial investigation of truth and justice from many difficulties. The memory of the assistance I have received from them, and the deep impression which the extraordinary mark they have now given me of their approbation and affection has made upon my mind, will be a source of perpetual consolation in my decline of life, under the pressure of bodily infirmities which made it my duty to retire.

"I am, Sir, with gratitude to you and the other gentlemen,

"Your most affectionate and obliged humble servant,

"MANSFIELD.

"Kenwood, June 15, 1788."

## CHAPTER XL.

### CONCLUSION OF THE LIFE OF LORD MANSFIELD.

LORD MANSFIELD lived nearly five years after his resignation, in the full enjoyment of all his mental faculties, memory included,—although his strength gradually declined. Since his house in Bloomsbury Square was burnt down, Kenwood had been his only residence; and here he remained, without being absent from it for a single night, till he breathed his last. He was much attached to the place: the great extent of the grounds gave ample scope for a display of his taste; he still went on planting and improving; he had great delight in showing the points from which the landscape appeared to most advantage; and he was gratified by the assurances which were truthfully poured out by his admiring friends, that there was nothing more charming to be seen within fifty miles of the metropolis.<sup>1</sup> He resumed his study of the writings of Cicero, and, above all, he now prized his treatise *DE SENECTUTE*, conforming himself much to the precepts there inculcated for giving a relish to this portion of human existence.

Amidst the literary recreations and rural employments which made his days glide on delightfully, we might wish that he could have said with old Cato, "*Causarum illustrium, quascunque defendi, nunc quam maxime conficio orationes;*" but although he had taken pains in correcting his judgments, he seems to have been quite indifferent about his oratorical fame, and he never had any ambition to be an author.

In the year 1784 he had lost his wife, after a happy union with her

<sup>1</sup> A few years ago, the fashionable world had an opportunity of appreciating the taste of the great Lord Mansfield in the formation of this place, and seeing the trees which, in his old age, he had planted with his own hand, a most splendid *fête champêtre* being given there by his great-grand-nephew and representative, the present noble Earl;—from whose splendid success on that occasion, the worshippers of the illustrious Chief Justice hoped that the *fête* would be annual.

of half a century. His domestic establishment was now regulated, and his home made cheerful, by two accomplished and affectionate nieces, daughters of Viscount Stormount.

The sudden cessation of professional occupation and political excitement is dangerous only to a man whose mind has not received early culture, and who is destitute of literary resources. Lord Mansfield in his retirement was never oppressed by *ennui* for a moment; and he found novelty and freshness in the calm, eventless life which he led. It should be mentioned, that his serenity was completed by a firm belief in the truths of religion and the habitual observance of the pious rites which it prescribes.

As a striking proof of the powers of mind and felicity of expression which still distinguished him, I am enabled to lay before the reader a few sentences dictated by him (which might be expanded into a folio volume) on a subject very interesting to his native country. Lord Swinton, a judge of the Court of Session, in the year 1787, published a pamphlet recommending the introduction of jury trial into Scotland in certain specified civil actions, and requested that he might have the opinion upon the subject of the individual best qualified to consider it from his unprecedented experience of juries and his familiar knowledge of the law both of Scotland and England. This request was conveyed through Lord Henderland, another judge of the Court of Session, who was related to Lord Mansfield by blood, and was married to his niece. The great jurist, thus consulted, as an oracle, was then disabled from writing by rheumatism in his hand, and, on the score of indisposition, civility declined giving any opinion to Lord Swinton; but his niece, Lady Anne, acting as his amanuensis, wrote a note to Lord Henderland, which thus concluded:—"L<sup>d</sup> H<sup>d</sup> will be so good to say so much, and no more, to L<sup>d</sup> Swinton; but the moment L<sup>d</sup> M<sup>d</sup> heard the papers read, he dictated the inclosed mend<sup>m</sup> for L<sup>d</sup> H<sup>d</sup>'s private use. He thinks the proposed introduction of juries is a very rash innovation, and will be attended with many consequences which no man alive can foresee."

Here follows the memorandum which was inclosed, every line of which is worth a subsidy:—

"Great alterations in the course of the administration of justice ought to be sparingly made, and by degrees, and rather by the Court than by the Legislature. The partial introduction of trials by jury seems to me big with infinite mischief, and will produce much litigation.

"Under the words proposed, it may be extended almost to anything,—*reduction, restitution, fraud, injury*. It is curious that fraud, which is always a complicated proposition of law and fact, was held in England as one of the reasons for a court of equity, to control the inconveniences of a jury trying it. The giving it to the desire of both parties might be plausible; but where one only desires that mode of trial it is a reason against granting it, because many causes and persons have popular prejudices attending them which influence juries.

"A great deal of law and equity in England has arisen to regulate the course and obviate the inconveniences which attend this mode of trial.

It has introduced a court of equity distinct from a court of law, which never existed in any other country, ancient or modern; it has formed a practice by the courts of law themselves and by acts of parliament, bills of exceptions, special verdicts, attainments, challenges, new trials, &c.

"Will you extend by a general reference all the law and equity now in use in England relative to trials by jury? The objections are infinite and obvious. On the other hand will you specify particularly what their system should be? The Court of Sessions and the Judges of England, added together, would find that a very difficult task."

These principles were unfortunately overlooked in the year 1807, when jury trial, exactly according to the English model, with its unanimity, special verdicts, and bills of exceptions, was introduced into Scotland. The experiment, I am afraid, has proved a failure, and Lord Mansfield's predictions have been fatally verified.

An amiable trait in his character, which distinguished him to the last, was, that he took a lively interest in the welfare of all connected with him. By his advice, two sons of Lord Henderland (the present Mr. Murray of Henderland, and Lord Murray, lately Lord Advocate, now a Judge of the Court of Session) were sent to be educated at Westminster School.<sup>1</sup> The aged ex-Chief Justice was exceedingly kind to the boys, had them at Kenwood during the holidays, and sought to inspire them with a love of literature.

In a letter from Mr. Murray, not written for publication, but from which I hope I may, without impropriety, make a few extracts, he says—

"I first saw Lord Mansfield when I went to Westminster School in 1787, and used occasionally to spend part of my holidays at Kenwood. He was very kind, treating me familiarly as a boy, and always called me *schoolfellow*. He took a great interest in all that was going on in Westminster School, used to talk of his boyish days, and relate anecdotes of what occurred when he was there. I remember one, of his having made a plum-pudding, and there being no other apparatus for the purpose, it was boiled in his nightcap: he told this with great glee. He always drank claret, and had a small decanter containing a few glasses placed by him at dinner, which he finished.

"He still took pleasure in ornamenting his grounds. Some cedars in the wood opposite the house were planted by his own hand.

"He was a great admirer of Pope, and occasionally selected passages from his poems which he taught me to recite. His voice and modulation were beautiful.

"He told me he had conversed with a man who was present at the execution of the Blessed Martyr. How wonderful it seems that there should only be one person between me and him who saw Charles's head cut off!"

He used to have parties of King's Bench lawyers to spend a day with

<sup>1</sup> It would appear that Lord Henderland was likewise influenced by the opinion of Dr. Johnson, with whom he had discussed the merits of English public schools, in a party at "The Mitre." See Boswell's Life of Johnson, iii. 9.

him, and I have myself heard some of those who were present describe how agreeable he was. On one occasion they found him reading under a spreading beech-tree, when a young gentleman said to him rather flip-pantly, "Instead of listening to the wrangling of Westminster Hall, how much better for your Lordship to be '*recubans sub tegmine fagi*.'"

He good-humoredly replied,—

"O Melibœe, DEUS nobis hæc otia fecit."

A great amusement for him was, to hear what was going on in the Court of King's Bench. With this view his countryman, James Allan Park, who became famous by compiling his decisions on the law of maritime insurance, used to visit him almost every evening during term, and to read to him what Lord Kenyon had been ruling in the morning.

He bore with much composure the sneers at "the equitable doctrines which had lately been introduced into that court;" and he revenged himself by laughing at his successor's false quantities and misapplied quotations, which induced George III., at last, to advise the new Chief Justice "to give up his bad Latin, and stick to his good law."

Lord Mansfield's contemporaries being all swept from the stage, he wisely consoled himself by making acquaintance with the rising generation; and he rejoiced that he could still converse with the illustrious masters of wisdom to be found in his library. He justly thought contemptuously of the low state into which literature had fallen when Hayley was considered the successor of Pope; and he used to give as a toast, "YOUNG FRIENDS AND OLD BOOKS."

He never was considered avaricious; his establishment was upon a footing which became a wealthy nobleman, and he would sometimes give away money generously; yet he certainly had considerable pleasure in watching the enormous accumulation of his fortune. He neither invested it in the funds nor bought land with it, but had it all secured on mortgage, saying, "The funds give interest without principal, and land principal without interest, but mortgages both principal and interest."<sup>1</sup>

After his retirement, he took no part whatever in politics: like the gods of Epicurus, he looked down upon the events that were passing in the world without in any degree seeking to influence them. The last time he ever attended in the House of Lords was on the 22d of May, 1788, when his presence was required in consequence of some proceedings connected with a writ of error from the Court of King's Bench; and he assisted neither the Government nor the Opposition by his proxy.<sup>2</sup> It seems most wonderful that he should not have interfered in the unprecedented crisis which immediately followed, when the kingly office was for some months suspended by the insanity of George III. One

<sup>1</sup> It is said that, at the time of his death, the annual interest on his mortgages amounted to 30,000*l*.

<sup>2</sup> I have ascertained these facts by searching the Lords' Journals; which give the names of all the peers present at every meeting of the House, and all the proxies entered, every session.



would have supposed that the ex-Lord Chief Justice of England, who had been familiarly acquainted with the leaders of the Revolution effected exactly a century before, would, like his great rival, have been led to his seat, if unable to walk without support, and, at the risk of dying in the effort, would have proclaimed to his countrymen, how, in his opinion, anarchy was to be warded off and the constitution was to be preserved. He once more showed that want of boldness which always prevented him from reaching the first rank of Statesmen. As a sound constitutional lawyer, I think he must have come to the conclusion that the right of electing a regent arrogated to themselves by the two Houses of Parliament was wholly inconsistent with the principles of hereditary monarchy; and that the heir apparent was entitled to exercise the prerogatives of the crown during the King's incapacity, as upon his natural demise. But he was probably afraid of avowing a doctrine which, though truly conservative, was most distasteful to all connected with the Government, on account of the transfer of power from one party to another which it was likely to produce; and he might have been reluctant to ally himself with Loughborough, who we now know, and he might then have discovered, had formed the desperate scheme of at once placing the Prince of Wales upon the throne without the sanction of Parliament.<sup>1</sup> However this may be, Lord Mansfield quietly ruminated amidst his cedars at Kenwood while the furious struggle was going on almost within his hearing at Westminster, and when the phantom of royalty was evoked by a *talisman* called the GREAT SEAL. Like all good subjects, he rejoiced in the King's recovery, which rescued the country from such embarrassment, and he joined in the splendid illumination which celebrated that event.<sup>2</sup>

Nevertheless he still fostered a spite against Mr. Pitt, which he was at no pains to conceal in private conversation; and, enjoying the difficulty into which the minister had fallen by his indiscretion respecting the Russian armament, he expressed a hope "that the power which had been acquired by empty rhetoric and a pretended wish for reform was drawing to a close."

But at the breaking out of the revolution in France he dreaded that the same wild love of liberty might be propagated in this country, and he was desirous that the Government should be supported. He took a very gloomy, and, as it turned out, a very just, view of this movement. His medical attendants now seem to have been his chief confidants. When the Constituent Assembly had agreed upon the first of the many constitutions attempted by our Gallic neighbors, and this seemed for the moment to be generally popular, Mr. Combe, his apothecary, observed to him, "Well, my Lord, the troubles in France are now over." "Over, sir, do you say?" answered Lord Mansfield; "my dear sir, they are not yet begun!"

<sup>1</sup> See Lives of the Chancellors, vol. vi. ch. clxx.

<sup>2</sup> On this occasion there was a grand display of fireworks from Kenwood, to the delight of the inhabitants of Highgate and Hampstead.

On another occasion, when he had a visit from Dr. Turton, his physician, he thus broke off a discussion respecting his symptoms:—

“Instead of dwelling on an old man’s pulse, let me ask you, dear Doctor, what you think of this wonderful French Revolution?” *Dr. Turton*: “It is more material to know what your Lordship thinks of it.” *Lord Mansfield*: “My dear Turton, how can any two reasonable men think differently of the subject? *A nation* which for more than twelve centuries, has made a conspicuous figure in the annals of Europe: a nation where the polite arts first flourished in the Northern Hemisphere, and found an asylum against the barbarous incursions of the Goths and Vandals: *a nation* whose philosophers and men of science cherished and improved civilization, and grafted on the feudal system, *the best of all systems*, their laws respecting the descents and various modifications of territorial property:—to think, that *a nation* like this should not, in the course of so many centuries, have learned *something* worth preserving, should not have hit upon some little *code of laws*, or a few principles sufficient to form one! Idiots! who, instead of retaining what was valuable, sound, and energetic in their constitution, have at once sunk into barbarity, lost sight of first principles, and brought forward a farrago of laws fit for Botany Bay! It is enough to fill the [A. D. 1792–1793.] mind with astonishment and abhorrence! A constitution like this may survive that of an *old man*, but nothing less than a miracle can protect and transmit it down to posterity!”

Horrors broke out and succeeded each other even more rapidly than he had anticipated; and, old as he was, he lived to hear the news that, every vestige of liberty being extinguished in France, the Reign of Terror was inundating the country with blood, and Louis XVI., the constitutional king, was executed on the scaffold as a malefactor.

By Lord Mansfield’s advice, his nephew, Lord Stormont, henceforth took an active part in the debates of the House of Lords, as a defender of the Government; saying, “that he was called upon, not by dislike of one set of public men or preference of another, but by the duty of averting the danger which threatened the constitution of the country, to range himself under the broad banner of the law, and to add one to the great phalanx that was to shield it from the poisoned arrows directed against it.”<sup>1</sup>

Mr. Pitt now involuntarily offered the new grant of the earldom of Mansfield, with a direct remainder, to Lord Stormont, without which this nobleman would never have been a British peer.

The ex-Chief Justice was probably the more gratified by the coalition which took place with a portion of the Whigs as it led to the dismissal of Lord Thurlow, whom he had ever disliked, and the transfer of the great seal to Wedderburn, for whom he felt kindness, notwithstanding the political lubricity which had marked the career of this splendid adventurer, and had brought some disgrace on their common country.

But the hour was at hand in which to the dying Lord Mansfield all

<sup>1</sup> Parl. Hist. 1571.

worldly speculations were vanity, and he had only to think of the awful change by which he was to enter into a new state of existence. So completely had he retained his mental faculties, that, only a few days before his last illness, his niece, Lady Anne, having in his hearing asked a gentleman what was the meaning of the word *psephismata* in Mr. Burke's book on the French Revolution, and the answer being that it must be a misprint for *sophismata*, the old Westminster scholar said "No, *psephismata* is right;" and he not only explained the meaning of the word with critical accuracy, but quoted off hand a long passage from Demosthenes to illustrate it.

Though never afraid of death, towards which he looked with composure and confidence, he was always afraid of suffering *pro forma*, as he expressed it; and a few years previously he had with much earnestness exacted a solemn promise from the physician who attended him, "that he would not unnecessarily torment him, but that, when he from experience should think his time was come, he would let him die quietly." The time had arrived when this injunction was to be obeyed.

On Sunday, the 10th of March 1793, although the night before he had been quite cheerful, and had with clearness expounded to Lord Stormont the merits of a law case then depending in the House of Lords, he did not talk at breakfast as usual, but seemed heavy, and complained of being very sleepy. He was placed in bed, and his pulse being low, stimulants and cordials were ordered for him. On Monday he was rather better, and on Tuesday he desired to be taken up and carried to his chair; but he soon wished again to be in bed, and said, "Let me sleep! let me sleep!" It might have been expected that, in the wandering of his thoughts which followed, he might have conceived himself in some of the most exciting scenes of his past life, and that he might have addressed some taunt to Lord Chatham respecting the action for damages to be brought against the House of Commons,—or, like Lord Tenterden, he might have desired the jury to consider whether the publication and the *inuendoes* were proved on a trial for libel, cautioning them to leave the question of *libel or no libel* for the court. But he never spoke more. On his return to bed he breathed freely and softly like a child, and with as calm and serene a countenance as in his best health, though apparently ever after void of consciousness. An attempt to give him nourishment having failed, his mouth was merely moistened with a feather dipped in wine-and-water. In this state he languished free from pain till the night of Wednesday the 20th of March, when he expired without a groan "in a good old age, full of days, riches, and honor." He had entered his 89th year; and as his life had been long and prosperous, so his death was such as he had desired. He was amply prepared for it. From the time when he was unable to attend his parish church, the communion had, at short intervals, been privately administered to him; and he was in the habit of piously declaring that he was ready to obey the summons from the world in which he had enjoyed so many blessings, contented and grateful.

Although he had long withdrawn from the gaze of mankind, the news



of his death caused a deep sensation, and there was a general desire that he should have a public funeral. All the judges and members of the bar had resolved to attend it in a body; and Whig statesmen as well as Tory intimated a desire to testify their respect for his merits as a magistrate by joining in the solemnity. But, his will being opened, it was found that after expressing a wish that he should be buried in Westminster Abbey, modestly giving as a reason "the attachment he felt for the place of his early education," he expressly directed that his funeral should only be attended by his relations and private friends. Accordingly his remains were deposited in Westminster Abbey in the same grave with those of his deceased wife, between the tombs of Lord Chatham and Lord Robert Manners; and there a splendid monument was erected to his memory, the workmanship of Flaxman,—the expense being defrayed by a legacy of 1500*l.* gratefully bequeathed for this purpose by a client for whom, when at the bar, by an extraordinary display of his eloquence, he had recovered a great estate.

His will, dated the 17th of April, 1782, all in his own hand-writing, thus piously began: "Whenever it shall please Almighty God to call me to that state to which, of all I now enjoy, I can carry only the satisfaction of my own conscience and a full reliance upon his mercy through Jesus Christ."—He then goes on in very plain, clear, and untechnical language to make provision for those depending upon him, to leave legacies to friends, and to bequeath the rest of his property to his nephew, Lord Stormont; thus concluding with good sense and good feeling: "Those who are nearest and dearest to me best know how to manage and improve, and ultimately in their turn to divide and subdivide, the good things of this world which I commit to their care, according to events and contingencies which it is impossible for me to foresee, or trace through all the mazy labyrinths of time and chance."

Lord Mansfield must, I think, be considered the most prominent legal character, and the brightest ornament to the profession of the law, that appeared in England during the last century. As an advocate he did not display the impassioned eloquence of Erskine, but he was for many years the first man at the bar among powerful competitors. Both before a jury in the Common Law courts, and addressing a single judge in the courts of Equity, by the calm exertion of reason he won every cause in which *right* was with him, or which was doubtful. There was a common saying in those days, "Mr. Murray's *statement* is of itself worth the argument of any other man." Avoiding the vulgar fault of misrepresenting and exaggerating facts, he placed them in a point of view so perspicuous and so favorable to his client, that the verdict was secure before the narrative was closed. The observations which followed seemed to suggest trains of thinking rather than to draw conclusions; and so skillfully did he conceal his art, that the hearers thought they formed their opinion in consequence of the working of their own minds, when in truth it was the effect of the most refined dialectics. For parliamentary oratory he was more considerable than any lawyer our profession could boast of till the appearance of Henry Brougham,—



having been for many years in both Houses in the very first rank of debaters. Lord Somers entered parliament late in life, and could not speak without long preparation. Lord Cowper was much more ready; but he had not had the benefit of an academical education, and his political information was rather limited. Lord Harcourt hardly aspired to rise above the level of the Tory squires by whom he was surrounded. Lord Macclesfield was unpolished, though forcible; and Lord King was dull and tiresome. Lord Hardwicke had very moderate success in the House of Commons, and his weight in the House of Lords arose rather from his high judicial reputation than from his eloquence. Lord Camden's set speeches in the House of Lords were admirable;—but he had been found quite unequal to the noise and irregularities of the House of Commons. Dunning, amidst all this turbulence, was in his element, and was listened to almost as well as Charles Fox himself;—but he could not bear the stillness of the Upper House, and there he fell into insignificance. Even Lord Plunkett caused disappointment when he spoke in the House of Lords, after having been acknowledged in the House of Commons to be superior to Peel or to Canning. Neither in the one House nor in the other did Erskine ever do anything at all commensurate to his forensic reputation. Thurlow prevailed more by the shagginess of his eyebrows and the loudness of his vociferation, than by his sentiments or his expressions; and the effect of Wedderburn's oratory, which was far more artistic, was ruined by his character for insincerity. When Lord Eldon had broken down an attempt he made in the House of Commons to be humorous, he never aimed at anything beyond the pitch of an Equity pleader; and Lord Redesdale's speeches in Parliament would have been reckoned dull even in the Court of Chancery. Of Lord Mansfield's three successors, Lord Kenyon, Lord Ellenborough, and Lord Tenterden, the first affected a knowledge of nothing beyond law, except a few Latin quotations which he constantly misapplied;—the second, though a scholar, and a ripe and good one, was only a few months in the House of Commons, during which he did nothing beyond bringing in a law bill; and in the House of Lords he rather alarmed the Peers by violent ebullitions of indignation, than charmed or convinced them by polished reasoning;—the last, having devoted all his best years to the drawing of special pleas, never was a member of the House of Commons, and the few times that he addressed the Lords he seemed to be opening to the jury the issues joined on some very complicated record. But when Murray was in the House of Commons, the existence of administrations depended upon his giving or withholding from them the aid of his eloquence, and in the House of Lords he was listened to with increased respect and deference. The combination of this excellence with his other performances is certainly much to be wondered at; for while his competitors were preparing for the approaching conflict by conning over the works of orators and poets, he was obliged to devote himself to the YEAR-BOOKS, and to fill his mind with the subtleties of contingent remainders and executory devises. Who is there that could have argued against Mr. Justice Blackstone in

the morning concerning the application of the rule in Shelley's Case, and in the evening shown himself equal to Lord Chatham on the question of the right of the British Parliament to tax America, or the policy of declaring war against Spain?<sup>1</sup>

Nothing remains to be said for the purpose of proving that he was the first of Common Law Judges. Looking to the state of the Court of King's Bench in his time, it is impossible not to envy the good fortune of those who practised under him. The most timid were encouraged by his courtesy, and the boldest were awed by his authority. From his quickness, repetition and prolixity were inexcusable; and there was no temptation to make bad points, as sophistry was sure to be detected, and sound reasoning was sure to prevail. When the facts were ascertained, the decision might be with confidence anticipated; and the experienced advocate knew when to sit down, his cause being either secure or hopeless. The consequence was, that business was done not only with certainty, but celerity; and men making many thousands a year had some leisure both for recreation and elegant literature.<sup>2</sup> We need not wonder that, being prosperous and happy under him, they were eager to pay him homage, and that they exulted in his paternal sway. We may form a notion of the love and respect with which he was regarded from the following appeal to him, when we know that the speaker was Erskine, the most fearless and independent of men, addressing him in the case of the Dean of St. Asaph:

"I am one of those," said he, "who could almost lull myself by these reflections from the apprehensions of *immediate* mischief, even from the law of libel laid down by your Lordship, if YOU were always to continue to administer it yourself. I should feel a protection in the gentleness of your character; in the love of justice which its own intrinsic excellence forces upon a mind enlightened by science, and enlarged by liberal education; and in that dignity of disposition, which grows with the growth of an illustrious reputation, and becomes a sort of pledge to the public for security. But such a security is a shadow which passeth away. You cannot, my Lord be immortal, and how can you answer for your successor? If you maintain the doctrines which I seek to overturn, you render yourself responsible for all the abuses that may follow from them to our latest posterity."<sup>3</sup>

<sup>1</sup> Soon after his death, the following tribute was paid to his powers as an orator, by one who had often listened to him:—"As a speaker in the House of Lords, where was his competitor? The grace of his action, and the fire and vivacity of his looks, are still present to imagination; and the harmony of his voice yet vibrates in the ear of those who have been accustomed to listen to him. His Lordship possessed the strongest powers of discrimination; his language was elegant and perspicuous, arranged with the happiest method, and applied with the utmost extent of human ingenuity; his images were often bold, and always just; but the character of his eloquence is that of being flowing, perspicuous, convincing, and affecting."—*Burton's Character of Classical Remains.*

<sup>2</sup> I have been told by Lord Erskine,—"In Lord Mansfield's time, although the King's Bench monopolised all the common-law business, the Court often rose at one or two o'clock,—the *papers*, special, crown, and peremptory, being cleared; and then I refreshed myself by a drive to my villa at Hampstead."

<sup>3</sup> Erskine's Speeches, i. 261.

There was no grumbling against him except by long-winded orators, who complained that during their impassioned replies he sometimes read a newspaper; but he never did so till the evidence was closed and he was complete master of the case. He would then, by looking at the *DAILY ADVERTISER*, give a hint that the public time was wasted by the counsel. Never, from indulging his curiosity about political events, did he make a remark which showed that he was not aware of the real question to be tried, nor afford any encouragement to move for a new trial by inadvertences into which he had fallen.

The absurd cry that he knew no law, gained countenance only from the envy of the vulgar, who are always eager to pull down those who soar above them to their own level, and, in our profession, will insist that if a man is celebrated for elegant accomplishments he can have no law, and if he is distinguished as a deep lawyer that he can have no elegant accomplishments;—

“The Temple late two brother-serjeants saw,  
Who deemed each other oracles of law;  
With equal talents these congenial souls,  
One lull’d the Exchequer, and one stunn’d the Rolls;  
Each had a gravity would make you split,  
*And shook his head at MURRAY as a wit.*”<sup>1</sup>

I cannot adopt Dr. Johnson’s refutation of the charge,—“As to Lord Mansfield’s not knowing law, you may as well say that a coachman who has driven a stage several times a day for twenty years between London and Brentford does not know the road,”—for no experience in practice, without a proper foundation by long study, will make a good lawyer; but in this instance we have before our eyes stupendous proofs of juridical knowledge, and the best answer is *CIRCUMSPICE*.

It has been said reproachfully, that, although he was a member of the legislature for half a century, we have no “Lord Mansfield’s Act.” Yet when our *CIVIL CODE* shall be compiled, a large portion of it, and one of the best, will be referred to his decisions. The observation has been truly made, that “he has done more for the jurisprudence of this country, than any legislator or judge or author who has ever made the improvement of it his object.”<sup>2</sup>

Unless Cowper’s suggestion, that the manuscripts of original works from his pen were burnt in the riots of 1780, be true, he never wrote any thing for the press. He was master, however, of a correct classical English style,—a very rare accomplishment among his professional contemporaries.<sup>3</sup>

We have a curious specimen of this in a sermon which he wrote for his friend and *protégé* Bishop Johnson, who was suddenly called upon to

<sup>1</sup> “*Frater erat Romæ consulti rhetor; ut alter  
Alterius sermone meros audiret honores,*” &c.

<sup>2</sup> Welsby, 448.

<sup>3</sup> Lord Chancellor Northington, his school-fellow at Westminster, could not write grammatically. After Bacon, Mr. Justice Blackstone was the first practising lawyer at the English bar who, in writing, paid the slightest attention to the selection or collocation of words.



preach in Westminster Abbey on the 29th of November, 1759, being a day of thanksgiving appointed to be observed for the signal successes with which his Majesty's arms had been blessed. A vote of thanks was passed by the Lords spiritual and temporal to the preacher for *his excellent discourse*, and he was ordered to "cause the same to be forthwith printed and published."<sup>1</sup> It accordingly was given to the world as the composition of "James, by Divine Providence Lord Bishop of Worcester." The most remarkable feature in it is its inculcation of "good revolution principles; showing a great change of sentiment since the times when the Chief Justice and the Bishop, supping at Mr. Vernon's, the Jacobite mercer in Cheapside, drank the Pretender's health upon their knees. The sermon,—which is from the text "*Blessed be the name of God for ever and ever, for wisdom and might are His*,"<sup>2</sup>—after dwelling upon the special interpositions of Providence in favor of this nation, particularly in dispersing the Spanish Armada, thus proceeds:—

"The same Providence, propitious to the liberties and the happy constitution of this country, in the next century gave a prosperous course to a fleet set out for the deliverance of this kingdom from arbitrary power, superstition and slavery."

It afterwards follows up a panegyric on the virtues of George II. with the following prayer:—

"May that God whose providence he devoutly adores in these his dispensations, give him a farther increase of glory and happiness by fresh advantages over his enemies; and, in His own good time, crown these important successes in war, and complete his happiness by making him the instrument of securing and establishing to us the solid and substantial blessings of peace! *And may the happiness we enjoy by his government be perpetuated to us under his family to the latest posterity!*"<sup>1</sup>

There is no equivoue here like "the King over the water." But I doubt not that both the Bishop and the Judge were now sincere, and that, the cause of the Stuarts being hopeless, they exulted in the prospects which the country had on the accession of a young prince into whose mind they had assisted to instil the doctrine of the divine right of kings, together with a horror of that religion which had proved the ruin of the exiled family.

Lord Mansfield appeared nowhere to greater advantage than in the social circle. He did not make a display of condescension like a low-bred man, who, accidentally reaching an elevated position, wishes kindly to notice his former associates. He did not imitate those who, by the joint exertion of a great memory and a loud voice, quite unconscious of doing any thing amiss, put an end to conversation by a perpetual pouring forth of observations and quotations which may be useful in an encyclopædia, but which are tiresome in a lecture. He always comported himself like a well bred gentleman among his equals. He considered that men are to gain renown in the field of battle, in the forum, and in the

<sup>1</sup> Lords' Journals, 3d Dec. 1759.

<sup>2</sup> Dan. ii. 20.

<sup>3</sup> Holl. 488, 491, 497.



senate, but that society is for relaxation; and instead of making people despise themselves and hate him by the overwhelming proof of superior powers and acquirements, he studied to render others dearer to themselves, and consequently to inspire them into a benevolent feeling towards himself, by giving them an opportunity of contributing to the general amusement, and of bringing out the information which they peculiarly possessed. His general rule was, to reward every man's jest with a smile, although he could not conceal his dislike to a bore or a coxcomb. According to the account of one who had been intimately acquainted with him for many years, "He was always as ready to hear as he was to deliver an opinion. The facility of conversing with ease and propriety he retained to the very last, and he was as quick at reply in his latter years as at any period of his life: whether he supported his own arguments or refuted those of his adversary, his observations were delivered with that judgment and grace which evinced the precision of a scholar and the elegance of a gentleman."<sup>1</sup>

Although he had too much taste systematically to aim at jocularity, there are *facetie* of his which still enliven the traditions of Westminster Hall.—An old Jew, who was dressed in a tawdry suit of clothes covered with gold lace, justifying as bail before him in an action brought to recover a debt of small amount, having sworn that he was worth double the sum, and having enumerated property belonging to him of much greater value, was still examined and cross-examined, and teased and badgered by Serjeant Davey,—till at last the Chief Justice exclaimed, "For shame, brother Davey! don't you see he would *burn* for the money?"

Trying a prisoner at the Old Bailey on a charge of stealing in a dwelling-house to the value of forty shillings, when this was a capital offence, he advised the jury to find a gold trinket, the subject of the indictment, to be of less value. The prosecutor exclaimed, with indigna-

<sup>1</sup> See Holliday, 475. The following description of his conversational powers is by Richard Cumberland:—"I cannot recollect the time when, sitting at the table with Lord Mansfield, I ever failed to remark that happy and engaging art which he possessed of putting the company present in good humor with themselves; I am convinced they naturally liked him the more for his seeming to like them so well. This has not been the general property of all the witty, great, and learned men whom I have looked up to in my course of life. He would lend his ear most condescendingly to his company, and cheer the least attempt at humor with the prompt payment of a species of laugh; which cost his muscles no exertion, but was merely a subscription that he readily threw in towards the general hilarity of the table. He would take his share in the small talk of the ladies with all imaginable affability; he was, in fact, like most men, not in the least degree displeased at being incensed by their flattery."—*Mem.* ii. 344.

"That his manners," says Lord Brougham, "were polished and winning, can easily be believed from the impression his public appearances uniformly made. But when to these were added his great and varied knowledge, chiefly of a kind available to the uses of society, his cheerful spirits and mild temper, his love of harmless pleasantry, and his power of contributing towards it by a refined and classical wit, it is not difficult to understand what the reports mean which unite in describing him as fascinating beyond almost all other men of his time." *Statesmen*, i. 121-122.

tion, "Under forty shillings, my Lord! Why the *fashion*, alone, cost me more than double the sum." Lord Mansfield calmly observed, "God forbid, gentlemen, we should hang a man for *fashion's sake*!"

An indictment was tried before him at the assizes, preferred by parish officers, for keeping an hospital for lying-in women whereby the parish was burdened with bastards. At the opening of the case he expressed doubts whether this was an indictable offence, and after hearing a long argument in support of it, he thus gave judgment:—We sit here under a commission requiring us to *deliver* this gaol, and no statute has been cited to make it unlawful to *deliver a woman who is with child*. Let the indictment be quashed."

Macklin, against whom he might be supposed to entertain some spite for libelling his countrymen under the names of *Sir Archy Macsarcasm* and *Sir Pertinax Mucsycophant*, recovered a verdict, with 700*l.* damages, in an action tried in the King's Bench for a conspiracy to hiss him off the stage. After the verdict was pronounced, the magnanimous player said, "My Lord, my only object was to vindicate, before the public, my own character and the rights of my profession; and having done so, I waive the damages awarded to me." *Lord Mansfield*: "Mr. Macklin, I have many times witnessed your performance with great delight; but, in my opinion you never *acted* so finely as in the last scene of this piece."

Having met at supper with the famous physician, Dr. Brocklesby, he entered into familiar conversation with him, and interchanged some stories a little trenching on decorum. It so happened that the Doctor had to appear next morning before Lord Mansfield, in the witness-box; when, on the strength of last night's doings, the witness nodded with offensive familiarity, to the Chief Justice as to a boon companion. His Lordship, taking no notice of his salutation, but writing down his evidence, when he came to summing it up to the jury, thus proceeded:—"The next witness is one *Rocklesby*, or *Brocklesby*, *Brocklesby* or *Rocklesby*,—I am not sure which,—and, first, *he swears that he is a physician*."

Trying an action which arose from the collision of two ships at sea, a sailor, who gave an account of the accident, said, "At the time, I was standing abaft the binnacle." Lord Mansfield asked, "Where is abaft the binnacle?" upon which the witness, who had taken a large share of grog before coming into court, exclaimed, loud enough to be heard by all present, "A pretty fellow to be a judge, who does not know where abaft the binnacle is!" Lord Mansfield, instead of threatening to commit him for his contempt, said, "Well, my friend, fit me for my office by telling me where *abaft the binnacle* is; you have already shown me the meaning of *half seas over*."

Lord Chief Baron Parker, in his 87th year, having observed to Lord Mansfield, in his 78th, "Your Lordship and myself are now at *sevens* and *eights*," the younger Chief replied, "Would you have us be all our lives at *sixes* and *sevens*?—but let us talk of young ladies, and not of old age."

After Parker had resigned, he continued to enjoy vigorous health; while Sir Sydney Stafford Smith, who succeeded him, was often prevented, by infirmity, from attending in Court: upon which Lord Mansfield

observed, "The new Chief Baron should resign in favor of his predecessor."

There was only one man at the bar to whom Lord Mansfield did not behave with perfect courtesy; and the temptation to *quiz* him was almost irresistible. This was Serjeant Hill, a very deep black-letter lawyer, quite ignorant of the world, and so incapable of applying his learning that he acquired the nickname of *Serjeant Labyrinth*. In an argument which turned entirely on the meaning of an illiterate old woman's will, he cited innumerable cases from the YEAR-BOOKS downwards; till Lord Mansfield at last asked, "Do you think, brother Hill, that though these cases may occupy the attention of an old woman, *this* old woman ever read them? or that any old woman can understand them?"

On the trial of an ejectment, a deed being offered in evidence which purported to be an "*indenture*," but which, instead of having its parchment edge running *zig-zag* as usual, appeared to have been cut quite straight, Serjeant Hill, for the defendant, objected that it could not be received in evidence, because "the law says that such a conveyance of real property must be by *indenture*; and this instrument is not an *indenture*, for there must be two parties to an *indenture*; therefore there are two parts of it, one to be executed by each party; the counterparts must be written on the same piece of parchment, and then cut in a waving line, so that, as a guard against forgery, they may fit in when applied to each other: the instrument is thus called an *indenture*, because it is *instar dentium*." He then fortified his argument by many *dicta* from the text-writers, and decisions from the YEAR-BOOKS. *Lord Mansfield*: "Brother Hill, hand me up the deed." Having applied it to his right eye, while he closed the left, and looked for some time along its edge, he thus pronounced judgment:—"I am of opinion that this is not a straight mathematical line; therefore it is *instar dentium*, and comes within your own definition of *indenture*. Let it be read in evidence."

The same Serjeant who had very little respect for the law of any living judge, aguing a question about whether there was sufficient evidence to support an action of trespass for breaking a hole through a wall which separated the houses of the plaintiff and the defendant, Lord Mansfield suggested that, although the hole was proved to be there, and the defendant had used it, possibly it might long before have existed there. The Serjeant thereupon, in rather an impertinent manner, exclaimed, "I should like any real lawyer to tell me whether there be any authority in the books for such a presumption?" *Lord Mansfield*: "I rather think, brother Hill, that you will find the point mooted in the case of '*Pyramus* and *Thisbe*;' <sup>1</sup> and, in the report of that case, if I remember right, it is said,—

"Fissus erat tenui rima, quam duxerat olim,  
Cum fieret, paries domui communis utrique.  
*Id vitium nulli per sæcula longa notatum.*" <sup>2</sup>

<sup>1</sup> 400 Mat. 55.

<sup>2</sup> The Serjeant was helpless in court, the laugh being always turned against him; but he revenged himself by writing in the margin of his law books many con-



A general officer in the army, a friend of Lord Mansfield, came to him one day in great perplexity, saying that he had got the appointment of governor of a West India island; which made him very happy till he found that he was not only to be commander-in-chief, for which he thought himself not unfit, but that he was likewise required to sit as chancellor and to decide causes, whereas he was utterly ignorant of law and had never been in a court of justice in his life. Lord Mansfield said to him, "Be of good cheer—take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently—then consider what you think justice requires, and decide accordingly. But never give your reasons;—for your judgment will probably be right, but your reasons will certainly be wrong." In telling the anecdote to his grand-nephew, the present Mr. Murray of Henderland, he added, "I was two or three years afterwards sitting at the Cock-pit upon Plantation appeals, when there was one called from my friend and pupil, the General,—which the losing party had been induced to bring on account of the ludicrously absurd reasons given for the judgment, which indeed were so absurd that he incurred some suspicion of corruption, and there was a clamor for his recall. Upon examining it, however, I found that the judgment itself was perfectly sound and correct. Regretting that my advice had been forgotten, I was told that the General, acquiring reputation by following it, began to suppose himself a great lawyer; and that this case brought before us was the first in which he had given his reasons, and was the first appealed against.

By the display of the wonderful powers and attainments to which I have referred, Lord Mansfield more steadily filled a larger space in the public eye than any civilian of his generation; and, sitting on his tribunal, he had acquired a fame equal to Wolf or to Rodney. Of this we have an instance in the following dialogue at the table of Dr. Scott (afterwards Lord Stowell,) at which many of the most distinguished men of the day were present:—*Johnson*: "Every man thinks meanly of himself for not having been a soldier, or not having been at sea." *Boswell*: "Lord Mansfield does not." *Johnson*: "Sir, if Lord Mansfield were in a company of general officers and admirals, who have been in service, he would shrink; he'd wish to creep under the table." *Boswell*: "No; he'd think he could try them all." *Johnson*: "Yes, if he could catch them; but they'd try him much sooner. No, sir; were Socrates and Charles the Twelfth of Sweden both present in any company, and Socrates to say 'Follow me, and hear a lecture in philosophy,' and Charles laying his hand on his sword, to say, 'Follow me, and dethrone the Czar,' a man would be ashamed to follow Socrates."<sup>1</sup> The compliment of Boswell may have little weight; but Johnson here allows

temptuous observations on Lord Mansfield, which may now be seen in Lincoln's Inn library. He survived to my time; and, although he had ceased to go into court, I have seen him walking up and down in Westminster Hall, wearing a great shovel hat, attached to his head with a silk handkerchief tied round his chin.

<sup>1</sup> Life of Johnson, iii. 287.



that Lord Mansfield, though of a nation whom he abhorred and wished to disparage, was the best instance which England then afforded of an illustrious noncombatant, and he brackets him with the greatest of Greek philosophers. Nor was the stern Scot-hater on this occasion influenced by any soothing homage or personal familiarity; for, strange to say, Lord Mansfield and he had never met,—as we learn from another dialogue between the same interlocutors. *Boswell*: “Lord Mansfield is not a mere lawyer.” *Johnson*: “No, sir: I never was in Lord Mansfield’s company; but Lord Mansfield was distinguished at the University. Lord Mansfield, when he first came to town, ‘drank champagne with the wits.’ He was the friend of Pope.”<sup>1</sup>

It would be highly instructive, considering Lord Mansfield’s multiplicity of engagements, all of which he fulfilled so admirably, to have learned what were the rules he laid down for the distribution of his time:—but all we know, and this should ever be borne in mind by those who would rise to eminence, that he was habitually industrious and habitually temperate. A sentence given him as a copy, when he began to learn text hand at Perth school, was

*Opere peracto ludemus.*

This he used often to repeat in after-life, and always to act upon. For example, when the great case of *Doe ex dem. Taylor v. Horde* was depending, which required a research into some of the most recondite points of the law of real property, he thus wrote to a friend:—“I am very impatient to discharge myself entirely of it. While the company is at cards I play my rubbers at this work, not the pleasantest in the world; but what must be done I love to do and have it over.” He would sometimes talk of the *dolce far niente*; and would quote the saying, “*Liber esse mihi non videtur, qui non aliquando nihil agit.*” But, in truth, he refreshed himself by varying his occupation, and allowing one faculty of his mind to repose while he called another into activity. Of course, such a system was inconsistent with a deranged stomach and aching temples. By nature (Dr. Johnson would probably have said *from early endurance*) he had a marvellous power of bearing abstinence. “After having waited for his regular meal, through the press of much and tedious business, to a late hour at night, he has repeatedly said that he never knew what it was to be thirsty, or faint with hunger.”<sup>2</sup> Yet he was no

<sup>1</sup> Life of Johnson, ii. 161. He softened his mortification by the delusive belief that Wm. Murray had been *caught very young*,—and he considered Lord Mansfield as in reality an Englishman when he gave his celebrated answer to the question—As you praise Buchanan so much although he was a Scotchman, what would you have said of him, Dr. Johnson, if he had been an Englishman?” “Sir, I would not have aid of him what I now *do say*,—that he was the only great man his country ever produced.”

<sup>2</sup> Holl. 56. There might be a curious chapter, in a treatise *DE CLARIS ORATORIBUS*, on the mode of their preparing themselves physically. Sheridan could not speak without a pint of brandy; and a celebrated speech in the House of Lords is said to have been inspired by mullet port. One of the greatest orators of the House of Commons is most powerful and imaginative after eating a pound

water-drinker ; and reverently recollecting how wine was supplied to the guests assembled at the marriage in Cana, on which so many epigrams had been made at Westminster, he thought there could be no sin in the moderate use of it. He had sufficient control over himself to be temperate without being ascetic. He always retained the Scottish taste for claret, which he had heard so loudly extolled and seen so liberally quaffed in his early youth,—and he said that in experience he found it to yield the most pleasure with the least risk of ill consequence. Insisting that it was peculiarly adapted to the temperament of Scotchmen, he would repeat John Home's lines, made when the tax was laid upon it, and sloe-juice became the substitute :—

“Bold and erect the Caledonian stood;  
Old was his mutton, and his claret good.  
‘Let him drink port,’ an English statesman cried:  
He drank the poison, and his spirit died.”

However, while he allowed his friends, like the Baron of Bradwardine, to indulge in a ‘tappit hen,’ he confined himself to a miserable cruet-full, set before him as his stint.

He gave very handsome dinners, not only to his aristocratic acquaintances, but to the Bar ; and every Sunday night in the winter season he had a *levee*, which was attended by distinguished men in all classes of society. This practice was then reckoned quite decorous among clergy as well as laity.<sup>1</sup> But, though he so far conformed to fashion, it ought to be recorded to his credit, that in an age of great profligacy, when kings, ministers, and judges, with no obloquy and little scandal, openly violated the rules of morality, he always set a bright example of the domestic virtues.<sup>2</sup>

That I may not be supposed, at the close of my biographical labors,

of cold roast beef, and drinking a quart of small beer ; while it is a well-known fact, that the finest speech of the younger Pitt was delivered immediately after a violent fit of vomiting. Some recommend tea ; some camphor julep ; and one orator that he might electrify his audience, as often as he is going to speak repairs to the Polytechnic and receives several shocks from a Leyden jar.

<sup>1</sup> Boswell, in mentioning Johnson's Tour to the Hebrides, published in 1775, says, “I found his ‘Journey’ the common topic of conversation, in London, at this time, wherever I happened to be. At one of Lord Mansfield's formal Sunday evening conversations, strangely called *leveés*, his Lordship addressed me—‘We have all been reading your travels, Mr. Boswell.’ I answered, ‘I was but the humble attendant of Dr. Johnson.’ The Chief Justice replied, with that air and manner which none who ever saw and heard him can forget, ‘He speaks ill of no body but Ossian.’”—Vol. ii. p. 332.)—How delightful if the great lexicographer himself had been there, and we could have had from Bozzy an account of the conference between him and the great lawyer who had drunk champagne with the wits ! I wish that he had kept up his literary connections, and that he had been known to us as the friend of Johnson as well as of Pope.

<sup>2</sup> There seems reason to think, that those who were the most intolerant on religious subjects were then often the most immoral : and it is an undoubted fact, that the eighteenth century, in which Dissenters and Roman Catholics were persecuted, was notorious for infidelity and immorality ; while the nineteenth century, along with liberality, has witnessed the spread of true piety, and an increased regard for the precepts of religion.

to have degenerated into an indiscriminate panegyrist of my hero, I must notice his defects and his faults. He cannot be considered a man of original genius. With great good sense he selected, he adapted, he improved,—but he never invented. It is only in Virgil's last category of immortals that he is to be inscribed:—

“*Quique sui memores alios fecere merendo.*”

It must likewise be admitted that, from a want of moral courage, he quailed not only under the ascendancy of Lord Chatham, whom beings of a superior order to our species might have been afraid to encounter,—but of Lord Camden, who was much his inferior in powers of mind and in acquired knowledge. His cry of *Craven!* when the lists had been stretched and the trumpet had sounded for a passage of arms on the Libel field, lowered his character, and must have been a source of painful remembrance for himself to his dying day. With boldness, he might have gained a victory which would have added new lustre to his name.<sup>1</sup>

A more serious defect was his want of *heart*. No one had a right to complain of him; he disappointed no just expectation of favor, and he behaved with kindness to all within the sphere of his action; but all that he did might have been done from a refined calculating selfishness, with a view to his own comfort and credit. He had no warmth of affection; he formed no friendships; and he neither made exertions nor submitted to sacrifices purely for the good of others.<sup>2</sup> The striking fact to prove that he *reasoned* rather than *felt* is, that he never revisited his native land, from the time when he first crossed the border riding a highland pony on his way to Westminster; although he left behind him his father and mother, who survived many years, and were buried in the church at Scone. It certainly is a very melancholy task to return to the haunts of early life after a long absence, and, little interest being excited by the new faces of the rising generation, a terrible shock is given by the ravages of time among our associates. The touching verses of Morris rush into our recollection,—

“There's many a lad I loved now dead,  
And many a lass grown old;  
And as the lesson strikes my head,  
My weary heart grows cold.”<sup>3</sup>

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<sup>1</sup> 16 Parl. Hist. 1321. ; ante, p. 487.

<sup>2</sup> Although he never lived in habits of much intimacy with very eminent lawyers, he was not stingy in praising them. He said that, “when Lord Hardwicke pronounced his decrees, Wisdom herself might be supposed to speak;” and on Erskine, whom he had advised to go to the bar, bursting out with lustre, he exclaimed,—

“*Cedite Romani; cedite Graii.*”

<sup>3</sup> Captain Morris's “Reasons for drinking:”—

“But wine for a while drives off despair;  
Nay, bids a hope remain:  
And this I think's a reason fair  
To fill my glass again!”

But surely it might have been some compensation to him to have stood upon the spot where he first caught a trout in the river Tay;—to have seen his name, carved half a century before with his own hand, on the walls of the school-house at Perth;—to have recollected the pride with which he had returned home to announce that he was Dux;—to have witnessed the satisfaction of his wondering townsmen in finding their prognostics of his success in life more than fulfilled;—to have once more been shaded by the tree under which he had taken leave of his parents,—to have again embraced them, or to have wept over their graves. But these things would not have helped him on in the career of ambition, and he cared for none of them.

From my Whig propensities, I may be expected to take an unfavorable view of his public conduct; but here I discover little ground for censure. No candid man can blame his early predilection for the *white rose*; or will say that he was guilty of any culpable inconsistency in taking office under the established government when the incurable infatuation of the Stuarts had been made manifest, and the nation was enjoying freedom and prosperity under the Brunswick line. He ever afterwards faithfully served the Crown to which he had sworn allegiance. As a party man, he was by no means liable to the charge of versatility and venality which weighed down his countryman Wedderburn. He had never pretended to be a “patriot,” and he never deserted any leader under whom he had enlisted. Although he was called a Whig in the reign of George II., the principles which he then avowed were the same with those which he acted upon in the reign of George III. when he was called a Tory. These were essentially Tory principles, and I individually dissent from them, but, as his biographer, I am not entitled to say that they were wrong. He entertained them sincerely, and acted upon them steadily, without ever suffering his love of prerogative or his jealousy of popular privileges to betray him into any act of sycophancy or of oppression. He ought to have been aware, however of the unconstitutional nature of the arrangement by which, being Chief Justice of the King’s Bench, he was, under various administrations, a member of the Cabinet; and the very boast that he made in Wilkes’ case, *that he had no concern in originating the prosecution*, proved his consciousness of the incompatibility of the duties which he had undertaken to perform. I am afraid, likewise, that after Lord Bute’s resignation, and on several subsequent occasions, he gave advice in the royal closet as the “King’s friend,” and that he exercised power without official responsibility. But these aberrations were thought of small importance eighty years ago,—when, although our constitution was theoretically the same, its practical working was very different from what we are accustomed to under the auspicious rule of Queen Victoria!

I add a few strictures upon the character of Lord Mansfield by others who may be much more deserving the attention of the reader. And I begin with a lampoon, to comfort those who are now the objects of similar attacks, and to show them that, if they have any real merit, it will not be long clouded even by the grossest scurrility. Thus was he



described in an article in a newspaper, supposed to be written by a professed friend holding a high judicial situation :<sup>1</sup>—

“ Full of the *tatterdemalion* honor of the man of quality, forsooth ! of his own country, he used to insult the English suitors in harangues of virulence and abuse. He had no persuasion in his manner, sweetness in his voice, nor energy in his expression : no variety of turn in tone and cadence, adapted to the purport of the matter he treated ; but was cursed with a loud, clamorous *monotony*, and a disagreeable discordance in his accents, as struck so harsh upon the ear that he seemed rather to scream than to plead ; and, from thence, was called ‘ *Orator STRIX*,’ or the Caledonian Screecher. He assumed a bullying audacity in his manner, and seemed by a pertinacious importunity, to overbear rather than gain the bench. This faculty, however, recommended him to the notice of such solicitors as dealt among the *canaille*, which, being much the larger part of the profession, supplied him with a competence of business.”<sup>2</sup>

But Smollett, in his history of the reign of George II., when noticing the supporters of Mr. Pelham’s administrations, mentions Mr. Murray as entitled to the first place in point of genius :—

“ This gentleman,” he continues, “ the son of a noble family in North Britain, had raised himself to great eminence at the bar by the most keen intuitive spirit of apprehension, that seemed to seize every object at first glance ; an innate sagacity, that saved the trouble of intense application ; and an irresistible stream of eloquence, that flowed pure and classical, strong and copious, reflecting in the most conspicuous point of view the subject over which it rolled, and sweeping before it all the slime of formal hesitation and all the intangling weeds of chicanery.”

In a volume of Political Characters, published in the year 1777, to which some of the most distinguished writers of the day contributed, we find the following passage :—

“ However party prejudices may adopt their different favoritities, and each labor in detracting from the merit of the other, it is, we believe, generally understood that precedence is allowed the Earl of Mansfield as the first magistrate that ever so pre-eminently graced that important station. The wisdom of his decisions, and unbiassed tenor of his public conduct, will be held in veneration by the sages of the law as long as the spirit of the constitution, and just notions of equity, continue to have existence. No man has ever in an equal degree possessed that wonderful sagacity in discovering chicanery and artifice, and separating fallacy from truth, and sophistry from argument, so as to hit the exact equity of the case. He suffered not justice to be strangled in the nets of form. His genius is comprehensive and penetrating ; and, when he judges it necessary, he pours forth sounds the most seductive, equally calculated to persuade and to convince. Among his rare qualifications may be added the external graces of his person, the piercing eye, the fine-toned voice,

<sup>1</sup> Chief Justice Willes.

<sup>2</sup> Broadbottom Journal, June 27th, 1746.

and harmonious elocution, and that happy arrangement which possesses all the accuracy and eloquence of the most labored compositions."

Lord Monboddo, after pointing out the peculiar characteristics of the eloquence of Demosthenes, observes:—

"Upon this, so perfect model of eloquence, Lord Mansfield formed a chaste and correct style of speaking, suitable to business, and particularly the business of a judge, to whose office it belongs not only to determine controversies betwixt man and man, but to satisfy the parties that they have got justice, and thereby give ease and contentment to their minds; which I hold to be one of the great uses of law. In this Lord Mansfield, as it is well known, was so successful, that even the losing party commonly acknowledged the justice of his decrees." Then the critic thus apostrophises the object of his praise: "Having spent so many years of your life—more, I believe, than any other man of this age—in the administration of justice, with so much applause and public satisfaction, I hope, my Lord, you will bear with patience and resignation the infirmities of old age; enjoying the pleasure of reflecting that you have employed so long a life so profitably in the service of your country. With such reflections, and a mind so entire as yours still is, you may be said to live over again your worthy life, according to the old saying:—

. . . 'hoc est  
Vivere bis, vita posse priore frui.'"

Bishop Hurd, after a general panegyric on Lord Mansfield for "his shining talents, displayed in every department of the state, as well as in the supreme court of justice, his peculiar province, which would transmit his name to posterity with distinguished honor in the public records of the nation," thus proceeds:—

"Of his conduct in the House of Lords I can speak with the more confidence because I speak from my own observation. He was no forward or frequent speaker, but reserved himself, as was fit, for occasions worthy of him. In debate he was eloquent as well as wise; or, rather, he became eloquent by his wisdom. His countenance and tone of voice imprinted the ideas of penetration, probity, and candor; but what secured your attention and assent to all he said was his constant good sense, flowing in apt terms and in the clearest method. He affected no sallies of the imagination, or bursts of passion; much less would he condescend to personal abuse, or to petulant altercation. All was clear candid reason, letting itself so easily into the minds of his hearers as to carry information and conviction with it."

I shall conclude these extracts from English writers with the testimony of Bishop Newton, who had lived with him three quarters of a century:—

"Lord Mansfield's is a character above all praise; the oracle of law, the standard of eloquence, and pattern of all virtue, both in public and private life. It was happy for the nation, as well as for himself, that at his age there appeared not the least symptom of decay in his bodily or

in his mental faculties; but he had all the quickness and vivacity of youth, tempered with all the knowledge and experience of old age. He had almost an immediate intuition into the merits of every cause or question which came before him; and, comprehending it clearly himself, could readily explain it to others: persuasion flowed from his lips, conviction was wrought in all unprejudiced minds, when he concluded, and, for many years, the House of Lords paid greater attention to his authority than to that of any man living."

Beyond the Atlantic the reputation of Mansfield is as high as in his own country, and his decisions are regarded of as great authority in the courts at New York and Washington as in Westminster Hall. The following tribute to his memory is from Professor Story, one of the greatest jurists of modern times:—

"England and America and the civilized world lie under the deepest obligations to him. Wherever commerce shall extend its social influences; wherever justice shall be administered by enlightened and liberal rules; wherever contracts shall be expounded upon the eternal principles of right and wrong; wherever moral delicacy and judicial refinement shall be infused into the municipal code, at once to persuade men to be honest, and to keep them so; wherever the intercourse of mankind shall aim at something more elevated than that grovelling spirit of barter in which meanness and avarice and fraud strive for the mastery over ignorance, credulity, and folly; the name of Lord Mansfield will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge. The maxims of maritime jurisprudence, which he engrafted into the stock of the common law, are not the exclusive property of a single age or nation, but the common property of all times and all countries. They are built upon the most comprehensive principles and the most enlightened experience of mankind. He designed them to be of universal application, considering, as he has himself declared, the maritime law to be not the law of a particular country but the general law of nations. And such under his administration it became, as his prophetic spirit, in citing a passage from the most eloquent and polished orator of antiquity, seems gently to insinuate: '*Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthæ; sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit.*' He was ambitious of this noble fame, and studied deeply and diligently and honestly to acquire it. He surveyed the commercial law of the Continent, drawing from thence what was most just, useful, and rational; and left to the world, as the fruit of his researches, a collection of general principles, unexampled in extant and unequalled in excellence. The proudest monument of his fame is in the volumes of Burrow and Cowper and Douglass, which we may fondly hope will endure as long as the language in which they are written shall continue to instruct mankind. His judgments should not be merely referred to and read on the spur of particular occasions, but should be studied as models of juridical reasoning and eloquence."<sup>1</sup>

<sup>1</sup> Story's Miscellaneous Works, 411, 412.

I have often in my youth conversed with men who had practised under Lord Mansfield, and who gave imitations of him. Erskine's were particularly fine, and avoiding everything of caricature and exaggeration, came up to the highest notion which could be formed of dignity, suavity, and impressiveness.<sup>1</sup> But the generation who witnessed the tones and the manner of Lord Mansfield is gone, and that which listened to his imitators is fast passing away.

With his features and personal appearance all must be familiar, for there were innumerable portraits of him, from the time when he was habited as a King's Scholar at Westminster, and his countenance was illumined by the purple light of youth, till he was changed "into the lean and slippered pantaloon."<sup>2</sup> Fortunately, before reaching the seventh age of man, his *strange eventful history* was brought to a close. The two best representations of him are supposed to be a full length, in judicial robes, by Reynolds, in the Guildhall of the city of London,—the scene of his greatest glory; and another, by Martin, in the hall of Christ Church College, Oxford, where he appears in an Earl's robes, sitting at a table, his right hand resting on a volume of Cicero, and a bust of Homer placed before him. There is likewise an admirable marble statue of him, by Nollekens, to be seen in Trinity Hall, Cambridge. Engravings and casts from these were formerly to be found almost in every cottage in Great Britain. But they will soon moulder into dust.

I have striven in this memoir to enable his admirers to follow the counsel given by Tacitus in concluding the life of Agricola: "ut omnia facta dictaque ejus secum revolvant, famamque ac figuram animi magis quam corporis complectantur."<sup>3</sup> I wish I could venture to add, "Quicquid ex eo amavimus, quicquid mirati sumus, manet mansurumque est in animis hominum, in æternitate temporum, famâ rerum."<sup>4</sup>

<sup>1</sup> Erskine's Mansfield was said to be as good as the late Lord Holland's Thurlow; to the excellence of which I can testify, having once seen and heard the original.

<sup>2</sup> The first extant is by Vanloo; and the last by Copley, a few weeks before his death.

<sup>3</sup> That mankind should continue to contemplate all that he said and did, and that, cultivating his fame, they should cherish the qualities of his mind rather than the lineaments of his person.

<sup>4</sup> All that was amiable in him, all that was admirable, remains, and will for ever remain; being narrated in the annals of his country, and embalmed in the remembrance of a grateful posterity.



















